IN THE UTAH COURT OF APPEALS

STEVEN J. ONYSKO, an individual, Petitioner, v. UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY, and UTAH CAREER SERVICE REVIEW OFFICE, Respondents.	Case No. 20180984

UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY'S RESPONSE BRIEF

On petition for review from the Utah Career Service Review Office,
Case No. 2010 CSRO/HO147

Ryan B. Hancey (9101)
J. Adam Knorr (15186)
KESLER & RUST
68 S. Main St., Ste. 200
Salt Lake City, Utah 84101
Telephone: (801) 532-8000
rhancy@keslerrust.com
aknorr@keslerrust.com
Counsel for Steven J. Onysko

PEGGY E. STONE (6658)
Assistant Utah Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100
Email: pstone@agutah.gov
Counsel for Utah Department of Environmental Quality

LIST OF CURRENT AND FORMER PARTIES

Petitioner: Steven J. Onysko ("Onysko"), represented by Ryan B. Hancey and J. Adam Knorr of KESLER & RUST.

Respondents: Utah Department of Environmental Quality ("DEQ,") represented by Assistant Utah Solicitor General Peggy E. Stone, and the Utah Career Service Review Office (unrepresented).

There were no other parties below.

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INTRODUCTION

At its heart, this case is about Onysko's workplace behavior toward everyone—especially supervisors, coworkers, and agency customers with whom he disagreed. The behavior became so abusive, intimidating, harassing, and bullying that he had to be fired for just cause and for the public good.

Despite Onysko's expertise as an engineer, his constant and escalating abusive conduct reached a point that it outweighed any good he contributed as an engineer. Onysko believes that he should not be evaluated on his behavior, but the state Legislature, the Division of Human Resource Management ("DHRM"), and DEQ have all determined otherwise. Indeed, statutes and rules are in place to ensure that all state employees have a work environment free from abusive conduct. Utah Code § 67-19-44(2); Utah Admin. Code R. 477-16. Here, the CSRO correctly upheld DEQ's decision to terminate Onysko's employment.

ISSUE PRESENTED

The CSRO's decision was reasonable and rational

DEQ fired Onysko because of his policy violations and substantiated abusive conduct toward coworkers, supervisors, and DEQ customers—conduct that compromised DEQ's ability to accomplish its mission and discredited the agency. The CSRO found that substantial evidence supported DEQ's allegations and that its decision was not an abuse of discretion. Is the CSRO's decision within the bounds of reasonableness and rationality?

Standard of Review

This Court "review[s] the CSRO's application of its rules for reasonableness and rationality." *Burgess v. Dep't of Corr.*, 2017 UT App 186, ¶ 15, 405 P.3d 937 (internal quotation marks and brackets omitted).

Preservation

The CSRO found that substantial evidence supported the DEQ's allegations and that the decision to terminate was not excessive, disproportionate, or an abuse of discretion. R. 4499-4541.

STATEMENT OF THE CASE

Onysko appeals the CSRO's ruling upholding DEQ's decision to terminate Onysko's employment. The CSRO determined that substantial evidence supported DEQ's allegations of abusive conduct and policy violations, and that DEQ did not abuse its discretion by imposing termination. The issue before this Court is whether the termination should be affirmed.

DEQ had three primary reasons for Onysko's termination. All related to his consistent and escalating abusive conduct toward DEQ personnel and customers. DEQ terminated him for disregarding an October 2016 written warning about his harassing and abusive conduct with a DEQ customer, a December 2016 written reprimand for violating the DEQ code of conduct, and a June 2017 investigation of an abusive conduct complaint, which found that Onysko engaged in abusive conduct.

Onysko's behavior violated DHRM rule, Utah Admin. Code R477-16 Abusive Conduct Prevention, and DEQ policy 480-04, Employee Code of Conduct. DEQ terminated Onysko's employment because his

behavior compromised DEQ's integrity and effectiveness and the termination was for the public good.

STATEMENT OF FACTS

Onysko worked as an Environmental Engineer III in DEQ's Division of Drinking Water ("DDW"), and had career service status. Onysko's expertise as an engineer has never been questioned.

In 2006, Onysko received a written warning, R. 4568, Ex. A-31,[1] about his interpersonal skills with coworkers. And in 2008, Onysko received another warning about inappropriate and unprofessional behavior. R. 4568, Ex. A-35.

In September 2016, Onysko's supervisor at DDW, Assistant Director Ying-Ying Macauley ("Macauley"), completed a performance evaluation of Onysko for July 1, 2015 through June 30, 2016. R. 4568, Exs. A-28, A-39. While Macauley gave Onysko an overall rating of successful, she noted that "there is room for improvement regarding . . . (follow up and follow through on assigned projects) as some projects are

[1] Record cites to exhibits provide the number on the cover of the binder and then the numbered exhibit (R. 4568, Ex. A-35). Record cites to the transcript provide the number of the flash drive with the page number (R. 4567 p. 2025).

not responded [sic] within the expected time frame." *Id.* Onysko disagreed with the evaluation, believing that he deserved a higher rating. He wrote a lengthy response that included several suggestions why he believed DDW management should be investigated:

> My inference is that DDW management more favorably performance-evaluates engineering staff who rubber-stamp public works engineering designs.
>
> * * *
>
> DDW management should first be investigated to determine whether or not there is conscious, deliberate under-supervision of new staff, and other junior staff, to leave them intentionally ill-prepared to review public works project designs, and intentionally ill-prepared to protect the public against water project design errors.
>
> Secondly, DDW management should be investigated to determine whether or not management's reasons for taking away certain review assignments from me is to "shop" the assignments to other less-senior staff until DDW management can find a less discerning engineer with consequent briefer review time and more likely favorable review finding.
>
> Thirdly, DDW management should be investigated to determine whether or not certain categories of review assignments for illegitimate reason are not given to me and other experienced engineers. It should be determined whether or not DDW management excludes experienced engineers from review of certain projects because DDW management fears our raising of design flaw issues that junior engineers, ill trained by DDW management, will not discern.

Id.; *see also* R. 4567 pp. 97-98. According to the hearing testimony, DDW management meant Macauley, and Macauley was likely the only one who would read the comments. *Id.*; R. 4567 p. 2025.

The following month, Macauley issued a written warning to Onysko after receiving complaints from regulated agencies and businesses (DDW customers) that they could not work efficiently with him based largely on his communication style and demeanor. R. 4568 Ex. A-16. And one of the individuals who made a complaint about Onysko's abusive behavior and conduct toward non-DDW employees, William Loughlin, testified at the CSRO hearing. R. 4567 878-79, 1869; R. 4568 Ex. A-19.

Macauley's warning gave Onysko six directions that he should follow regarding his future conduct and behavior:

> Abide by all State, DEQ, and DDQ rules, policies, procedures, and business practices including but not limited to the DEQ Code of Conduct and the DDW Operating Principles.
>
> Demonstrate a customer service focused attitude geared toward collaborative assistance during all interactions with others at work. Use your professional knowledge to serve the public and present DDQ in a professional manner.
>
> Provide quality service to customers. Communicate in a positive and congenial way what is needed and helpful and

> how customers can best accomplish any changes needed to comply with DDW's requirements.
>
> Limit your work related actions to implementing requirements within DDW's authority. If there are any issues related to implementing or enforcing rules of other divisions and offices in State government, they shall be referred to the appropriate division or office.
>
> Stay within the scope and authority of DDW. Do not demand customers to provide information in formats you prefer, or demand information not required by DDW's rules.
>
> Do not threaten delayed processing if customers do not produce work in the format you prefer.

R. 4568 Ex. A-16. Almost a month later, and in response to the October 17 warning, Onysko sought Macauley's telephone records for the previous six months through a GRAMA request. R. 826-27, 830-31. Onysko also grieved the warning the same day, throwing doubt on his stated reasons for wanting all of Macauley's phone records. R. 4518.

On December 16, 2016, Macauley prepared a *notice of intent to discipline-written reprimand* related to another incident where Onysko acted in an unprofessional manner with a non-DDW employee. R. 4568 Ex. A-11. Onysko's behavior violated the DEQ Code of Conduct. *Id.*

Later that day, Macauley and DHRM representative, Michelle Watts, met with Onysko at his workplace to try and deliver and discuss the *notice of intent to discipline-written reprimand* with him, but he

became upset and stated he was unable to continue due to health reasons. R. 4567 p. 1254. Macauley and Watts then left the notice on Onysko's desk. R. 4567 pp. 136-37, 630-32.

The following Monday, Onysko met with Watts to discuss the December 16 notice. He told Watts he intended to file a criminal complaint regarding the manner the notice was delivered. R. 829; R. 4567 pp. 137, 1241.

Onysko also provided a written response to the December 16 notice stating it did not specify the reasons for intended discipline. R. 4568, A-12, 4567 pp. 126-29. Macauley later replied adding the reasons for the proposed discipline. R. 4568, A-13; R. 4567 pp. 128-30. Onysko grieved the written reprimand.

After receiving the December 16 notice, Onysko submitted another GRAMA request seeking all sanitary surveys performed by Macauley. R. 827, 830; R. 4567 p. 1018. And on January 4, 2017, Onysko filed an abusive conduct complaint against Macauley with DHRM. He later personally gave Macauley the abusive conduct complaint. R. 4567 p. 208.

On January 13, 2017, Macauley issued a *notice imposing discipline-written reprimand*. R. 4572 Ex. G -364; R. 4567 p. 152. Onysko protested this notice claiming it did not include the mandatory notice of his right to appeal. On January 23, 2017, Macauley revised the notice to include Onysko's right to appeal. R. 4567 p. 704. Onysko's grievances to the written warning and reprimand were denied by DEQ Executive Director Alan Matheson in March 2017.

On January 18, 2017, Macauley filed her own abusive conduct complaint against Onysko. She amended it three times on February 15th, April 12th and 20th. R. 4572 Ex. G-389; R. 4567 pp. 376-380.

On April 12, 2017, DHRM determined that Onysko's complaint against Macauley was unsubstantiated. And in May 2017, DHRM issued an investigation report (the "Report") of Macauley's complaint. R. 826-834. The investigation reviewed seven allegations of Onysko's abusive conduct:

> i. That Onysko, after receiving the December 16, 2016 Written Reprimand, told Watts that he intended to file a criminal complaint regarding the circumstances of the document's December 16, 2016 delivery.
>
> ii. That following the October 2016 Written Warning, Onysko filed multiple records requests under GRAMA for all of Macauley's telephone records over a six-month period, and

that he left copies of the GRAMA requests on Macauley's desk.

iii. That following his receipt of the January 2017 Written Reprimand, Onysko made a records request under GRAMA for all sanitary survey reports done by Macauley, and again left a copy of the request on Macauley's desk.

iv. That Onysko's comments to the July 2016 evaluation threatened Macauley.

v. That on April 7, 2016, Onysko complained to another manager about Macauley's conduct in an April 6, 2016 meeting. Macauley asserted Onysko's conduct was abusive because the victim of the conduct did not consent to the complaint.

vi. That on February 28, 2017, Onysko commented to staff that Macauley had inappropriately revealed confidential information.

vii. That Onysko "intentionally spreads lies to harm [Macauley's] professional reputation."

R. 826. DHRM substantiated the first four allegations, but found that although the last three happened, they did not rise to the level of abusive conduct. R. 829-832.

On June 12, 2017, DEQ placed Onysko on paid administrative leave pending its review of the investigation report. R. 4568 Ex. A-8. And several days later, DDW Director Marie Owens issued Onysko an *Intent to Discipline - Dismissal for Just Cause and the Good of the Public Service*. Director Owens based her decision to recommend the

termination of Onysko's employment on the findings of the Investigation Report, Onysko's previous disciplinary actions, and her conclusion that Onysko's actions were disruptive to the workplace. R. 4568 Ex. A-8; R. 4567 p. 1514.

On August 1, 2017, Onysko met with DEQ Executive Director Matheson to discuss the *Intent to Discipline - Dismissal*. They met for 2 hours and Onysko presented 162 pages of documents in support of his argument that DEQ should not terminate his employment. R. 19.

Onysko and DEQ tried to resolve their issues, short of termination of employment, but those discussions ended by October 20, 2017. And on October 23, 2017, based on the conclusion of the investigation and DDW Director Owen's recommendation, Executive Director Matheson issued a final agency decision terminating Onysko's employment. R. 19-21.

Onysko's abusive conduct had a negative impact on DDW and DEQ, and that was highlighted by his absence. While he was on administrative leave and following his termination, employees no longer had to deal with his constant and abusive conduct. Accordingly, morale and productivity in DDW and DEQ increased significantly. R. 4567 pp.

620-621. DDW Director Owens observed that after Onysko was no longer working "we were actually able to increase our workload and . . . efficiency to get projects out." R. 4567 p. 620. Water Plan Supervisor Bernie Clark believed that Onysko could not get along with the other engineers and he noticed a positive change in demeanor and morale of "plan review engineers" when Onysko was gone. R. 4567 p. 1352:15-21; 4568 Ex. A-21; R. 4567 pp. 1358-59.

Course of Proceedings and Disposition Below

A week after his firing, Onysko initiated his CSRO proceeding challenging his dismissal and alleging numerous violations of rules adopted under Chapter 19 of the Utah State Personnel Management Act.

A CSRO hearing officer conducted a seven-day evidentiary hearing. R. 4567. On November 5, 2018, the CSRO issued a 42-page Findings of Fact, Conclusions of Law, and Decision[2] upholding Onysko's termination. R. 4499-4540. Onysko's timely petition for review followed.

[2] Attached as addendum A.

SUMMARY OF THE ARGUMENT

The CSRO's ruling that upheld DEQ's decision to terminate Onysko's employment should be affirmed. For various reasons, Onysko argues that the factual findings that he engaged in abusive conduct should be disregarded by this Court. But there is no reason to do so. First, substantial evidence supports the CSRO's factual findings.

Second, the CSRO did not impermissibly use Onysko's conduct and demeanor during the hearing as the basis of any factual finding. Instead, the CSRO evaluated Onysko's conduct and demeanor to determine his credibility and the credibility of witnesses who testified about how he acts and treats others when he disagrees with them.

Third, no factual finding was based on hearsay alone. The factual findings are all supported by personal observations, perceptions, and opinions and the reasonable inferences from that evidence.

Next, Onysko argues that he did not receive proper notice and process during the termination proceedings. But Onysko had all the notice and process to which he was due. He had a meaningful opportunity to present his side of the story and to convince DEQ Executive Director Matheson not to terminate his employment. The

Notice of Intent to Terminate gave Onysko enough explanation to understand the grounds for his termination. And Onysko fails to explain how any alleged deficiencies in the notice hindered him or prevented him from presenting his case to Matheson or what Onysko would have done differently. That is fatal to his claim of inadequate notice.

Moreover, even if Onysko's pre-termination notice could have been more specific, he had a full and robust post-termination hearing before the CSRO. He had the opportunity for full discovery, he could file motions, and he examined and cross-examined witnesses. He took part in a seven-day hearing and received all the notice and process he was due.

Further, the CSRO did not uphold Onysko's termination on grounds other than those in the pre-termination notice. The Notice of Intent to Terminate gave him fair notice of every ground upon which DEQ was basing its decision. And importantly, the administrative code's discretionary factors, which act as aggravating and mitigating circumstances, are not independent grounds for termination. Instead, they go to what discipline should be imposed. Onysko knew of those

factors before the CSRO hearing and had an opportunity to examine both DDW Director Owens and DEQ Executive Director Matheson about them.

Last, the CSRO correctly found that DEQ's decision to terminate Onysko's employment was proportional and consistent. Onysko failed to address Executive Director Matheson's discretion or show that termination was outside of the reasonable range of decisions. Both Matheson and Owens testified and explained how they reached their decision to terminate Onysko's employment. And the conclusion was logical, reasonable and justified. Further, Onysko failed to show that he was disciplined inconsistently with other similarly situated employees. DEQ presented evidence of other discipline and how further progressive discipline would not have improved Onysko's behavior or willful abusive conduct. And that conduct demonstrated an adverse effect on DEQ's operations and employees. Onysko's termination was in the public good.

ARGUMENT

I. Standards of Review of CSRO Proceedings.

This Court's "review of the CSRO's decision falls under Utah's Administrative Procedures Act." *Burgess*, 2017 UT App 186, ¶ 14.

Under the Administrative Procedures Act, the appellate court shall grant relief only if, based on the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

* * * *

> (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
>
> (h) the agency action is:
>
> (i) an abuse of the discretion delegated to the agency by statute; [or]
>
> * * * *
>
> (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency, or
>
> (iv) otherwise arbitrary or capricious.

Utah Code § 63G-4-403(4). "Thus, [this Court] examine[s] the CSRO's findings of fact to determine whether substantial evidence supported the Department's allegations." *Burgess*, 2017 UT App 186, ¶ 14 (citing *Lucas v. Murray City Civil Serv. Comm'n*, 949 P.2d 746, 758 (Utah Ct. App. 1997)).

Further, this Court "review[s] the CSRO's application of its own rules for reasonableness and rationality," "according the agency some, but not total, deference." *Id.* ¶ 15. The CSRO abuses its discretion only "when it reaches an outcome 'that is clearly against the logic and effect of such facts as are presented in support of the application, or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing.'" *Sorge v. Office of Atty. Gen.*, 2006 UT App 2, ¶ 22, 128 P.3d 566 (quoting *Tolman v. Salt Lake Cty. Atty.*, 818 P.2d 23, 26 (Utah Ct. App. 1991)).

The standard is not a correctness standard: "Reasonableness . . . is essentially a test for logic and completeness rather than the correctness of the decision." *Murray v. Utah Labor Comm'n*, 2013 UT 38, ¶ 32, 308 P.3d 461. "[A] discretionary decision involves a question with a range of 'acceptable' answers, some better than others, and the agency . . . is free to choose from among this range without regard to what an appellate court thinks is the 'best' answer." *Id.* ¶ 30.[3]

[3] To the extent that the CSRO is reviewing DEQ's policies, that is reviewed for correctness. *Aiono v. Utah Dep't of Corr.*, 2017 UT App 143, ¶ 12, 405 P.3d 721.

The CSRO's Limited Review

"[T]he CSRO's role in examining the Department's personnel actions is a limited one." *Burgess*, 2017 UT App 186, ¶ 13. "[T]he CSRO is first required to 'make factual findings based solely on the evidence presented at the hearing without deference to any prior factual findings of [the Department].'" *Id.* (quoting Utah Admin. Code R137-1- 21(3)(a)). "The CSRO must then determine whether 'the factual findings . . . support with substantial evidence the allegations made by [the Department] and whether [the Department] has correctly applied relevant policies, rules, and statutes.'" *Id.* (quoting Utah Admin. Code R137-1-21(3)(a)(i)-(ii)).

"If the factual findings support the Department's allegations, the CSRO 'must determine whether [the Department's] decision, including any disciplinary sanctions imposed, is excessive, disproportionate or otherwise constitutes an abuse of discretion.'" *Id.* (quoting Utah Admin. Code R137-1-21(3)(b)). "In making this later determination, the CSRO . . . shall give deference to the decision of [the Department]." *Id.* (quoting Utah Admin. Code R137-1-21(3)(b)). "In other words, the CSRO's authority to review departmental disciplinary actions 'is limited

to determining if there is factual support for the charges and, if so, whether the sanction is so disproportionate to the charges that it amounts to an abuse of discretion.'" *Id.* (quoting *Lunnen v. Dep't of Transp.*, 886 P.2d 70, 72 (Utah Ct. App. 1994).

II. Substantial Evidence Supported the CSRO's Findings and Its Decision to Uphold Onysko's Termination and Did Not Exceed the Bounds of Reasonableness and Rationality.

A. Substantial evidence shows Onysko engaged in abusive conduct.

"Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Burgess*, 2017 UT App 186, ¶ 16. "It is more than a mere 'scintilla' of evidence and something less than the weight of the evidence." *Id.*

In conducting a substantial evidence review, this Court does not review the CSRO's findings de novo or reweigh the evidence. *See Lucas*, 949 P.2d at 758. As the Utah Supreme Court has explained the reviewing court does not "reweigh the evidence" or "independently choose which inferences . . . are the most reasonable." *Provo City v. Utah Labor Comm'n*, 2015 UT 32, ¶ 8, 345 P.3d 1242. The Court defers

to the administrative agency's findings because "when reasonably conflicting views arise, it is the agency's province to draw inferences and resolve these conflicts. *Id.* In addition, this Court defers to the CSRO's findings on issues of credibility. *See Lucas*, 949 P.2d at 758.

Based on the whole record, the CSRO's findings that Onysko engaged in abusive conduct toward supervisors, coworkers and DEQ customers, and negatively impacted DEQ's integrity and effectiveness are plainly supported by substantial evidence. Indeed, most of the evidence is uncontested.

And a "party challenging the [CSRO's] findings of fact must marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." *Uintah Cty. v. Dep't of Workforce Servs.,* 2014 UT App 44, ¶ 5, 320 P.3d 1130 (quotation and brackets omitted). "When a party challenging a factual finding fails to marshal the evidence in support of that finding, [this Court] assume[s] that the record supports the finding." *Id.* ¶ 7 (internal quotation and brackets omitted). Onysko does not marshal any evidence in support of the factual findings that form

the basis of the finding that he engaged in abusive conduct and that his termination was in the public good. Without marshalling the evidence, Onysko cannot meet his burden of persuasion on appeal.

Here, the CSRO reasonably and rationally concluded that Onysko's conduct violated DEQ and DHRM policies. The CSRO's decision that termination was not excessive, disproportionate, or an abuse of discretion is also within the bounds of reasonableness and rationality.

B. More than hearsay supports the CSRO's factual findings.

Onysko challenges several factual findings, arguing that they are based solely on hearsay. But an actual review of the findings shows that is inaccurate.

First, Onysko's challenges the "finding" that Mr. Lunstad "expressed concern" about testifying because Onysko might "retaliate" against him. The CSRO did not make such a finding. That statement was in a section of preliminary procedure. R. 4500-01. It was not included in the section of "Findings of Fact." And the CSRO specifically said that "Mr. Lunstad's email is not evidence and the CSRO did not consider Mr. Lunstad's email in deciding this case." R. 4501 n. 4.

Second, Onysko complains about several factual findings that are all related to how he treated coworkers and others: including threatening them with filing or actually filing complaints against them; how coworkers were afraid they would be his next target; his inability to work collaboratively with anyone; how outside customers complained about Onysko's conduct and behavior; and how DDW and DEQ morale was low when Onysko was there, but improved in his absence. These findings are linked to and based on the same testimony and the reasonable inferences based on that testimony. And, contrary to Onysko's assertion, these factual findings are supported by more than hearsay.

DDW Director Owens testified about her personal observations and belief about DDW productivity and Onysko's inability to work as a team or collaboratively. R. 4567 p. 621. Macauley testified that productivity increased after Onysko was no longer there. R. 4567 pp. 437-38. Plan Review Supervisor Clark testified that Onysko exhibited an inability to get along with other engineers. R. 4567 p. 1352; *see also* R. 4568 Ex. A-21. The reasonable inference from the testimony was

that productivity increased because people were working as a team—after Onysko was no longer a part of the work environment.

Owens, Clark and Macauley all testified that it was their personal perception and opinion that morale in the DDW increased after Onysko was no longer there. R. 4567 pp. 437-38, 621, 1352. As Executive Director, Matheson was entitled to use any and all information relayed to him to form his opinion that Onysko had a detrimental effect on DDW and DEQ morale.

Macauley testified about Onysko filing complaints against her, and other engineers. R. 4567 pp. 257-58. She also testified that Onysko filed GRAMA requests on projects that were not his but belonged to other DDW engineers. R. 4567 p. 261. Michelle Watts testified that Onysko threatened to file a criminal complaint concerning how the notice of written reprimand was delivered. R. 4567 p. 1241. Substantial evidence supported the finding that Onysko had a history of filing complaints against coworkers when he disagreed with them. It is not unreasonable to make the finding from the drawn inference that coworkers were afraid to become his next target.

The 2016 discipline recounted complaints from DEQ customers complaining about Onysko's abusive conduct and unprofessional interactions with them. R. 4568 Ex. A-11. And William Loughlin testified that he was one of the customers who complained. R. 4567 pp. 878-89, 1869; R. 4568 Ex. A-19.

The factual findings are supported by substantial evidence that is not hearsay. And that evidence leads to the reasonable conclusions that Onysko's conduct toward coworkers and supervisors was abusive. He did not work well with anyone, threatened those who disagreed with him, his conduct was detrimental to morale, and his behavior discredited and was detrimental to DEQ's mission and operations.

Last, Onysko complains that the finding that he left the GRAMA requests regarding Macauley's phone records on her desk is based on only hearsay. But the CSRO was entitled to make that conclusion based on all the evidence presented. Macauley was aware that the GRAMA requests were directed squarely at her, but as the subject of them, she need not have known. R. 4579. It was not unusual for Onysko to let Macauley know about his complaints about her because he personally delivered a copy of the abusive conduct complaint he filed against

Macauley directly to her. R. 4567 p. 208. Brian Embley testified about his DHRM investigation and his opinion and conclusion that Onysko did leave the requests on her desk. R. 4567 pp. 1662-63. Onysko did not question Macauley about it. He never elicited contrary evidence to dispute the allegation, despite knowing it was in the DHRM Investigation Report. The CSRO's finding is supported by substantial non-hearsay evidence.

Moreover, even if the factual finding that Onysko put the GRAMA requests on Macauley's desk is disregarded, it does not change the outcome of the hearing. There is still substantial evidence that Onysko engaged in a pattern of other abusive conduct. The evidence supports the conclusion that Onysko intended to cause Macauley "intimidation, humiliation, or unwarranted distress" in ways unrelated to leaving the GRAMA requests on her desk.

None of the alleged "hearsay findings" need be disregarded. They are all supported by non-hearsay evidence, and they all support the conclusion that Onysko engaged in abusive conduct and conduct detrimental to DEQ's operations and efficiency.

C. The CSRO's assessment of Onysko's conduct and demeanor during the CSRO proceedings was not improper.

The CSRO did not improperly consider Onysko's conduct and demeanor during the proceedings. Onysko argues that considering his conduct is akin to allowing evidence of a defendant's past convictions for rape or drug use as proof that the defendant committed rape or drug use in the current trial. But that is not what happened here.

The CSRO observed Onysko's conduct and demeanor first hand and, in fact, was often the target of conduct that was "intended to intimidate" it. R. 4526-27; *see also* R. 2645, 2650-51 (Onysko saying that the Hearing Officer's conduct is "illegitimate" and arguments are "specious"), R. 3382-83, 3385, 3390 (Onysko is "appalled that the Hearing Officer has abused his authority in concocting fake legal arguments with no foundation in recognized precedent."); *see also* R. 4567 pp. 1178; 1319; 1204,1227-28. The CSRO, in evaluating Onysko's credibility and the credibility of other's testimony about "the disruptive, morale-breaking, and intimidating nature" of Onysko's conduct, R. 4528, was certainly allowed to consider conduct and demeanor it witnessed first-hand.

Credibility is always relevant and a fact-finder may always consider a witness' demeanor because "only the [fact-finder] can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Besemer City, N.C.*, 470 U.S. 564, 575 (1985).

Indeed, the ability to observe a witness "often proves the most accurate method of ascertaining the truth." *U.S. v. Oregon State Med. Soc'y*, 343 U.S. 326, 339 (1952); *State v. Griffin*, 685 P.2d 546, 549 (Utah 1984) (fact-finder in best position to judge credibility based on viewing witness demeanor first hand); *Meyer v. Aposhian*, 2016 UT App 47, ¶ 13, 369 P.3d 1284 (fact finder is uniquely equipped to assess credibility because views witnesses' demeanor first hand).

Here, the CSRO did not base any factual findings on Onysko's conduct and demeanor during the hearing. Instead, the CSRO noted that it was easier to believe the testimony of others, who testified how Onysko treated and interacted with them, based on the CSRO's first-hand observation of how Onysko treated and interacted with the individuals involved in the hearing. Onysko represented himself at the hearing and must therefore accept the consequences of that decision,

including the fact that his behavior throughout the proceeding and in all its phases would be on display. The CSRO did not err.

And even if the CSRO somehow erred by considering Onysko's conduct and demeanor as a measure of the credibility of witnesses who testified about Onysko's behavior, that error was harmless. The testimony regarding how Onysko treated supervisors, coworkers, and DEQ customers with whom he disagreed was uncontested and supported by other substantial evidence. Noting Onysko's conduct and demeanor during the hearing does not require or demand reversal here.

III. The CRSO's Decision Upholding Termination Was Within The Bounds of Reasonableness and Rationality.

A. Onysko had adequate notice.

Onysko had adequate notice of the reasons for his termination. And he had all of the pre-termination and post-termination process that was required. "Due process is not a technical conception with a fixed content unrelated to time, place, and circumstances; it is flexible and requires such procedural protections as the particular situation demands." *Larsen v. Davis County*, 2014 UT App 74, ¶ 11, 324 P.3d 641. "[T]he root requirement" of the Due Process Clause is "that an

individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542 (1995) (internal quotation marks omitted). For a merit employee like Onysko, who enjoys a constitutionally protected property interest in his employment, that principle requires "some form of pretermination hearing"; that is, "some opportunity for the employee to present his side of the case." *Id.* at 542-43.

This "pretermination 'hearing,' though necessary, need not be elaborate." *Id.* at 545. Indeed, "the pretermination hearing need not definitively resolve the propriety of the discharge;" instead, it operates as "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id*. at 545-46. Thus, the "essential requirements" are "notice and an opportunity to respond"—"[t]he opportunity to present reasons, either in person or in writing, why proposed action should *not* be taken." *Id*. at 546 (emphasis in original). To secure this right, "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an

opportunity to present his side of the story." *Id.* "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.*

To successfully challenge a termination, an employee must identify procedural errors and "establish how these procedural errors were harmful"—that is, how compliance with these procedures "would have resulted in a different outcome absent such errors." *Lucas*, 949 P.2d at 755. Here, Onysko argues that he did not have "meaningful pre-termination notice." *Aplt. Brief* at 28. But his written notice provided him with adequate notice and allowed him an opportunity to explain the reasons why he should not face termination of his DEQ employment.

This Court has previously addressed the level of specificity required in the "notice of the charges" and "explanation of the employer's evidence." *Hugoe v. Woods Cross City*, 2013 UT App 278, ¶ 9. 316 P.3d 979. There, Hugoe argued that the notice was too vague to inform him of the incident upon which the City used as grounds for his termination. The notice said that the City was considering discipline "as

a result of incidents which, if substantiated, [were] in violation of City policy, including threatening, intimidating or interfering with fellow employees on the job, insubordination, misusing City property, and using vulgar language." *Id.* ¶ 8.

This Court rejected Hugoe's claim and held that even though the notice did not specifically reference a particular incident or identify the specific evidence that would be used against Hugoe, the notice was adequate. Hugoe "failed to adequately explain how the deficiencies in the notice inhibited his ability to respond to the allegations against him." *Id.* ¶ 9.

Here, Onysko had adequate pre-termination notice. The intent to terminate letter was quite clear. It referenced Onysko's previous discipline in 2006, 2008, October 2016, December 2016, and the findings of the DHRM Investigation Report. R. 007. It referred to the GRAMA requests, threats to file a police report, and threats to his supervisor over the performance evaluation. *Id.* 007-08. The notice mentioned, as part of Onysko's abusive conduct, he had "a consistent and troubling pattern of using otherwise unobjectionable activities like filing GRAMA requests and complaints, administrative or otherwise, to intimidate or

distress coworkers as well as management." *Id.* at 008. It also referred to attempts to modify his behavior by coaching and progressive discipline through the written reprimands and warning. The notice references "unnecessary project scrutiny" and repeated researching and criticizing other employee's projects and "accused coworkers of incompetence," and repeated threats and follow through with complaints to "DOPL against other engineers with whom [Onysko] disagreed." It referenced a complaint about his uncollaborative communication style and how his conduct caused unnecessary administrative process and burdensome delays in Division processes and damage to morale in the DDW. It also referenced the specific DHRM and DEQ policies that Onysko was charged with violating. R. 008.

In response to the notice, Onysko met with DEQ Executive Director Alan Matheson on August 1, 2017. R. 19. Onysko had Representative Tim Quinn attend the meeting with him. The meeting lasted for two hours and Onysko argued against his termination. He also had a binder with 162 pages of documents to support his argument. R. 19. Similar to the facts in *Hugoe*, that meeting served as "an initial

check against mistaken decisions" and Onysko presented his reasons why DEQ should not go through with his termination. No more was required. And here, like *Hugoe*, Onysko fails to explain what the deficiencies in the notice were and how they kept him from responding to the allegations against him. He provides no explanation of how an even more detailed notice would have permitted him to be better prepared." *Lucas*, 949 P.2d at 755.

But even if more pre-termination notice were required, any alleged deficiencies were more than rectified by the full and robust post-termination process that Onysko received. At the CSRO, Onysko had full discovery and received the DHRM Investigation report in October 2017. And he had all of DEQ's witnesses and evidence that it intended to produce at the hearing. The CSRO hearing lasted 7 days and Onysko was able to cross-examine witnesses and put on his own evidence.

Nowhere does Onysko show how he was not given the chance to be heard in a meaningful manner, how different notice would have changed the results, or how he would have responded differently. Onysko received all the process and notice to which he was due. The CSRO's decision should be upheld.

B. Onysko was not terminated on grounds of which he was unaware or had no prior notice.

The CSRO did not uphold DEQ's decision to terminate Onysko's employment on grounds that Onysko had no prior notice. Onysko complains that he had no pre-termination notice of several of the grounds that the CSRO used to uphold DEQ's decision to terminate Onysko's employment. The record shows otherwise.

First, as explained above, the CSRO did not base any factual findings on Onysko's conduct and demeanor at the hearing. Nor was that used as a reason to uphold DEQ's decision to terminate Onysko's employment. Onysko's conduct and demeanor went only to his credibility and to bolster the credibility of DEQ witnesses who testified about how Onysko treated and interacted with them.

Second, as explained above, the letter of intent adequately identified or referenced the grounds for Onysko's termination. Here, Onysko argues that the CSRO erred by upholding Onysko's termination on certain conduct of which he had no notice. But those events were mentioned or referenced in the letter of intent. Specifically, Onysko complains about the findings that: (1) Onysko gave Macauley a copy of his abusive conduct complaint against her and that "it is more likely

than not" that he unnecessarily left copies of his GRAMA requests on her desk; (2) Onysko failed to follow the "specific directions" in the 2016 written warning; (3) his written comments in his 2016 Evaluation intimidated, humiliated, and caused his supervisor unwarranted distress; (4) Onysko entered coworkers' files without authority to do so; (5) Onysko threatened to file a criminal complaint over the way the intent to reprimand letter was delivered to him.

The Notice of Intent mentions or references all of these adequately. Even Onysko notes that the notice of intent generally mentions or asserts these grounds. But never explains how he would have responded differently if he had more specific allegations in the Notice of Intent. That failure is fatal to his claim.

Moreover, where Onysko actually argues for a different interpretation of the evidence regarding those findings, he failed to marshal the evidence in support of the CSRO's interpretation of the evidence. For example, he argues that the CSRO's finding that his written comments caused Macauley unwarranted distress was not in the Notice of Intent because the "threat" mentioned in the Notice meant a verbal threat to expose negative information about Macauley if she

did not remove her criticism in the 2016 evaluation. But Onysko's conclusion is based on the interpretation of the evidence that he wanted the CSRO to make. It is the CSRO's province, not appellate courts, to weigh conflicting evidence and make credibility determinations. *See Lucas,* 949 P.2d at 758 ("We do not review the [CSRO's] findings de novo or reweigh the evidence. Instead, we defer to the [CSRO's] finding on issues of credibility." (internal quotation omitted)).

Third, the CSRO found that the fifth, sixth, and seventh findings in the Investigation Report corroborated other evidence about Onysko's conduct. Importantly, the CSRO did not uphold Onysko's termination based on those findings. Onysko was terminated, in part, on the Investigation Report's substantiation that he engaged in abusive conduct. That report held that the fifth, sixth, and seventh allegations happened, but were not abusive conduct. Even DEQ did not base Onysko's termination on those allegations.

And last, Onysko complains about the CSRO relying on the "consensus of the witnesses . . . that [DEQ] productivity and morale improved after" Onysko left DEQ. The letter of intent mentions Onysko's negative impact on DEQ productivity and morale. But even so,

Onysko was not entitled to written notice of that allegation because it was based on the discretionary factors that an agency head may use to determine what discipline should be imposed after the decision to discipline has been made. Utah Admin. Code R477-11-3 lists several factors that the head of the agency may consider. One of those factors is "(k) the effect on agency operations, including . . . the potential of the conduct to adversely affect morale and effectiveness of the agency." *Id.* R. 477-11-3(k). Both Director Owens and Executive Director Matheson testified about their perceptions of the increase in morale and agency productivity after Onysko left DEQ. Onysko had the opportunity to cross-examine them about that testimony at the hearing. The CSRO did not err by upholding DEQ's decision to terminate Onysko based on that finding.

C. **Onysko's termination was both proportional and consistent.**

"'In assessing whether employee misconduct warrants the sanction imposed, this [C]ourt has divided the inquiry into two prongs: (1) Is the sanction 'proportional'? and (2) Is the sanction consistent with previous sanctions imposed by the [agency] pursuant to its own

policies?'" *Burgess*, 2017 UT App 186, ¶ 35 (quoting *Perez v. South Jordan City*, 2014 UT App 31, ¶ 24, 320 P.3d 42). But "this two pronged inquiry" is not "a stand-alone test for reviewing the validity of [the agency's] decision," and this Court "need not apply a rigid two-part test in every case." *Perez*, 2014 UT App 31, ¶ 24.

Instead, this Court considers proportionality and consistency insofar as those standards aid the determination of whether the agency abused its discretion or exceeded its authority. *Id.* As set forth below, the CSRO was reasonable and rational in upholding Onysko's termination.

1. Proportionality.

Onysko argues that his discipline was disproportionate because the only legitimate grounds for discipline are the October 2016 Written Warning and the December 2016 Written Reprimand. He fails to explain why the 2017 Investigation Report cannot be considered.

"When examining the proportionality of a sanction, the CSRO is restricted to determining whether the agency's sanction 'is excessive, disproportionate or otherwise constitutes and abuse of discretion.'"

"There is no single set of factors that must be considered when conducting a proportionality review." *Burgess*, 2017 UT App 186, ¶ 38.

Discipline is proportionate when it is appropriate to the severity of the underlying conduct. In other words, serious misconduct should receive serious discipline. Here, Onysko engaged in prohibited abusive conduct, and that finding is supported by substantial evidence.

Significantly, Onysko failed to address Executive Director Matheson's discretion or show that termination was clearly outside the reasonable range of decisions his discretion would have allowed him to make considering all the information that Matheson had. *See Tolman*, 818 P.2d at 26 ("Discretion encompasses the power of choice among several courses of action, each of which is considered permissible[.]" (internal quotation marks and brackets omitted)); *Murray*, 2013 UT 38, ¶30 ("a discretionary decision involves a question with a range of 'acceptable' answers"). Nor can Onysko make such a showing. Executive Director Matheson's discretion left him "free to choose from among this range without regard to what an appellate court thinks is the 'best' answer." *Id*.

DEQ, in its discretion, proceeded from the Written Reprimand to termination of employment. DDW Director Owens testified why she concluded that Onysko's abusive conduct justified termination. She testified about her belief, as Onysko's supervisor, that he was fully aware of his behavior and the impact it had on coworkers and he had no intention of changing. R. 4567 p. 639. Director Owens was confident that Onysko's abusive behavior would continue, was willful and intentional, and could be stopped only by terminating his employment. R. 4567 pp. 643, 762. Onysko's negative impact on was highlighted by Owens's testimony that she noticed while Onysko was on administrative leave, DDW work output increased, and the team was able to work collaboratively. R. 4567 p. 621.

Executive Director Matheson testified similarly. He stated that Onysko's abusive conduct was significant enough for termination of employment. R. 4567 pp. 1018-19. He testified that, in his opinion, Onysko's abusive conduct was severe enough that it interfered with DEQ's operations and mission. R. 4567 pp. 912-13. Onysko's behavior toward DEQ employees and the public was affecting public confidence in both DDW and DEQ. DDW's job is to protect public drinking water

supplies. R. 4567 pp. 894, 924. While negotiations between DEQ and Onysko were going on, Matheson hoped that Onysko would recognize the impact of his conduct on the agency and his coworkers, but he saw no change in Onysko's behavior. R. 4567 p. 1064.

The record evidence makes clear that both DDW Director Owens and Executive Director Matheson considered the severity of the violations, and other discretionary factors, in determining the appropriate level of discipline. The CSRO correctly determined that DEQ's choice was supported by valid reasons and was rational, logical, reasonable, and was not an abuse of discretion. Onysko has not shown otherwise.

2. Consistency.

DEQ's decision to terminate Onysko's employment was consistent with discipline of other employees. Onysko "carries the burden to prove that [the Department] inconsistently sanctioned similarly situated employees." *Nelson v. Orem City, Dep't of Public Safety*, 2012 UT App 147, ¶ 27 n.6, 278 P.3d 1089 (internal citations omitted); *see also Lunnen*, 886 P.2d at 72 ("The agency has the initial burden to show that the discipline was not disproportionate to the misconduct. Once the

agency fulfills that initial burden, it is incumbent on the employee to raise any due process concerns, including consistency[.]"). "When challenging a sanction's consistency, the disciplined employee must first make out a prima facie case by pointing to specific instances or statistics, rather than relying on an unsupported assertion of inconsistent punishment.'" *Burgess*, 2017 UT App 186, ¶ 49 (quoting *Perez*, 2014 UT App 31, ¶ 26).

Before the CSRO, Onysko did not show "meaningful disparity" between his sanction and the sanctions imposed on similarly situated employees, and to the extent that he did now some disparity, DEQ explained why it terminated Onysko's employment. The CSRO correctly found that termination for Onysko's conduct was not unreasonable given "repetition of the conduct and its effect on the operations of [DEQ] and on its staff." R. 4535.

Other employees who were disciplined for unprofessional or inappropriate conduct toward coworkers or outside persons received written warnings and one was suspended and then terminated. Except for the terminated employee, the others received no further discipline for more than a year ago, one since September 2015, and the others for

longer than two years. DEQ disciplined Onysko twice in four months and then received DHRM's investigation that sustained the abusive conduct complaint against him. DEQ had already tried progressive discipline with Onysko and it failed. Onysko "did not show any prospect of improving his conduct," and his conduct "demonstrated an adverse effect on [DEQ's] operations and its employees." R. 4535. DEQ's decision to bypass the step of suspension was supported by substantial evidence, and Onysko did not show otherwise.

CONCLUSION

Despite his expertise as an engineer, Onysko's constant and escalating abusive conduct finally outweighed his contributions as an engineer. The state's policy is to provide a workplace free of abusive conduct. Substantial evidence supported the allegations that Onysko engaged in abusive conduct. The CSRO's ruling upholding DEQ's

decision to terminate his employment was within the bounds of reasonableness and rationality. This Court should affirm.

Dated this 29th day of April, 2019

PEGGY E. STONE
Assistant Utah Solicitor General
Counsel for Utah Department of Environmental Quality

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 8350 words, excluding those parts of the brief exempted by Utah R. App. P. 24 (f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14 point font (headings in 16 point, footnotes in 14 point).

Dated this 29th Day of April, 2019

Peggy E. Stone

PEGGY E. STONE
Assistant Utah Solicitor General
Counsel for Utah Department of Environmental Quality

CERTIFICATE OF COMPLIANCE WITH RULE 21 GOVERNING PUBLIC AND PRIVATE RECORDS

1. This brief complies with the requirements of Utah R. App. P. 21(g) because this brief and the attached addenda do not include any non-public information.

Dated this 29th Day of April, 2019

PEGGY E. STONE
Assistant Utah Solicitor General
Counsel for Utah Department of Environmental Quality

CERTIFICATE OF SERVICE

This is to certify that the forgoing, Utah Department of Environmental Quality's Response Brief, was emailed to the Utah Court of Appeals for filing and two copies were mailed, via USPS postage prepaid, to counsel on the 29th day of April, 2019.

Ryan B. Hancey
J. Adam Knorr
KESLER & RUST
68 S. Main St., Ste. 200
Salt Lake City, Utah 84101
Telephone: (801) 532-8000
rhancy@keslerrust.com
aknorr@keslerrust.com
Counsel for Steven J. Onysko

R. FIELDING PRATT

Addendum A

CSRO Findings of Fact

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW OFFICE

STEVEN J. ONYSKO, Grievant, v. UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY, Agency.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER** Case No. 2010 CSRO/HO 147 Hearing Officer Geoffrey Leonard

Career Service Review Office Hearing Officer Geoffrey Leonard (Hearing Officer) held a Step 4 evidentiary hearing in this case on July 17-19, September 10-12, and September 20, 2018. Agency Utah Department of Environmental Quality (Agency) was represented by Assistant Attorneys General Daniel Widdison and Alain Balmanno. Grievant Steven Onysko (Grievant) appeared *pro se*. A certified court reporter made a verbatim record of the proceedings. Witnesses[1] were placed under oath and examined, and testimony and documentary exhibits[2] were received into the record. At the conclusion of the hearing, the Hearing Officer directed the parties to make

[1] Agency's witnesses included: Ying-Ying Macauley; Michelle Watts; Bryan Embley; Marie Owens; and Alan Matheson. Grievant called as direct or rebuttal witnesses the following including: Ying-Ying Macauley; Dana Powers; Michelle Watts; Brad Johnson; Jenny Potter; Bernie Clark; Bob Thompson; Nagendra Dev; Shane Bekkemellom; Bill Laughlin; Alan Matheson; Cathy (Lewis) Moss; Bryan Embley; Kathleen Johnson; and Kim Dyches. For reasons set out herein, Grievant did not testify at the Step 4 hearing.

[2] The Hearing Officer admitted as evidence Agency exhibits: A-1, A-1, A-2, A-5, A-6, A-7, A-8, A-9, A-10, A-11, A-12, A-13, A-16, A-18, A-23, A-24, A-31, A-32, A-33, A-34, A-35, A-36, A-37, A-39, A-40, A-41, A-42, and A-43. The Hearing Officer admitted Grievant exhibits: G-112, G-113, G-114, G-117, G-118, G-119, G-123, G-128, G-130, G-131, G-133, G-136, G-139 G-141, G-146, G-147, G-149, G-154, G-158, G-175, G-255, 272, G-319, G-343, G-348, G-364, G-376 (first page only), G-380, G- 389, G-419 (pages 4, 7, and 13 only), G-422 (demonstrative purposes only), G-430, G-461 (first three pages only), G-467, G-486, G-489, and G-493.

additional submissions. The record was closed after those submissions were filed on October 8, 2018.[3]

AUTHORITY

The Career Service Review Office (Office) is authorized to hear and decide this case under *Utah Code Ann*. §67-19a-406 and *Utah Admin. Code* R137-1-1 *et seq*.

STATEMENT OF THE ISSUES

1. Is Agency's termination of Grievant's employment supported by just cause, or to advance the good of the public service?

2. Did Agency correctly apply relevant policies, rules, and statutes?

2. If not, what is the appropriate remedy?

SUBSIDIARY AND PROCEDURAL ISSUES

Before the start of the hearing proper, the parties argued Agency's July 9, 2018 *Motion to Dismiss Grievant's Claims Under the Utah Protection of Public Employees Act*. The Hearing Officer granted the Motion and dismissed all Grievant's claims of retaliatory action.

After Agency concluded its case in chief, Grievant moved for summary judgment in his favor, arguing that Agency had not carried its burden of proof. Construing the evidence introduced to that point in favor of Agency, the non-moving party, the Hearing Officer concluded that Agency had established a *prima facie* case supporting its decision to terminate Grievant and that disputed issues of relevant fact remained, and denied the motion.

During the Step 4 hearing, Grievant filed a *Motion to Compel the Attendance of his Designated Witness Nathan Lunstad*. At the hearing on September 12, 2018, the Hearing Officer denied this motion on the ground that Mr. Lunstad's anticipated testimony would be cumulative of

[3] The record was temporarily reopened to allow Grievant to file objections to the Agency's closing argument.

Grievant's and others' testimony, or would not be material, and on his determination that Mr. Lunstad's testimony would likely be unreliable.[4]

The parties filed numerous other motions and requests during and after the Step 4 hearing. Decisions on those motions were made by separate written order or on the record during the hearing.

Agency moved to seal a portion of the record relating to Marie Owen's testimony. The Hearing Officer granted that motion and has entered a separate order to that effect.

FINDINGS OF FACT

Based on the testimony of witnesses and on the exhibits accepted into evidence, the Hearing Officer makes the following findings of relevant and material fact.

1. At all times relevant to this proceeding, Agency Utah Department of Environmental Quality (DEQ) employed Grievant Steven Onysko as an Environmental Engineer III in DEQ's Division of Drinking Water (DDW).

2. At all times relevant to this proceeding, Grievant had career service status.

3. On July 12, 2006, Agency issued Grievant a *Memorandum of Written Warning* regarding his interpersonal skills with coworkers.[5]

4. On February 25, 2008, Agency issued Grievant a *Memorandum* warning him as to his inappropriate and unprofessional conduct in a February 15, 2008, incident in the DDW offices.[6]

---

[4] Mr. Lunstad sent an email to the Office requesting that he not be called to testify as he believed Grievant would retaliate against him if his testimony was unfavorable. *See also* Hearing Exhibit A10, *Investigative Report*, pp. 3-4, where Mr. Lunstad is recorded as expressing concern that Grievant might retaliate against him for his participation in that investigation. Mr. Lundstad's email is not evidence and the Hearing Officer did not consider Mr. Lundstad's email in deciding this case.

[5] Exhibit A-31.

[6] Exhibit A-35.

5. On September 27, 2016, Grievant's supervisor, DDW Assistant Director Ying-Ying Macauley, completed an evaluation of Grievant's performance between July 1, 2015 and June 30, 2016.[7]

6. The evaluation rated Grievant's performance as "successful." However, Ms. Macauley noted that "there is room for improvement regarding expectation #4 (follow up and follow through on assigned projects) as some projects are not responded [sic] within the expected time frame."

7. Grievant believed that he deserved at least a "very successful" rating and that Ms. Macauley's "successful" rating was unfair.

8. In the "Employee Comment" section of the evaluation form, following Ms. Macauley's "room for improvement" observation, Grievant wrote:

> My inference is that DDW management more favorably performance-evaluates engineering staff who rubber-stamp public works engineering designs.
>
> * * *
>
> DDW management should first be investigated to determine whether or not there is conscious, deliberate under-supervision of new staff, and other junior staff, to leave them intentionally ill-prepared to review public works project designs, and intentionally ill-prepared to protect the public against water project design errors.
>
> Secondly, DDW management should be investigated to determine whether or not management's reasons for taking away certain review assignments from me is to "shop" the assignments to other less-senior staff until DDW management can find a less discerning engineer with consequent briefer review time and more likely favorable review finding.
>
> Thirdly, DDW management should be investigated to determine whether or not certain categories of review assignments for illegitimate reason are not given to me and other experienced engineers. It should be determined whether or not DDW management excludes experienced engineers from review of certain projects

---

[7] Exhibit A-39.

> because DDW management fears our raising of design flaw issues that junior engineers, ill trained by DDW management, will not discern.[8]

9. On October 17, 2016, Ms. Macauley issued Grievant a *Written Warning* based on complaints from Agency clients and Grievant's coworkers to the effect that they could not work efficiently with him.[9] Those complaints were generally directed to Grievant's communication style and demeanor.

10. The *Written Warning* included six separate directions as to Grievant's future conduct, directing Grievant to:

> Abide by all State, DEQ, and DDQ rules, policies, procedures, and business practices including but not limited to the DEQ Code of Conduct and the DDW Operating Principles.
>
> Demonstrate a customer service focused attitude geared toward collaborative assistance during all interactions with others at work. Use your professional knowledge to serve the public and present DDQ in a professional manner.
>
> Provide quality service to customers. Communicate in a positive and congenial way what is needed and helpful and how customers can best accomplish any changes needed to comply with DDW's requirements.
>
> Limit your work related actions to implementing requirements within DDW's authority. If there are any issues related to implementing or enforcing rules of other divisions and offices in State government, they shall be referred to the appropriate division or office.
>
> Stay within the scope and authority of DDW. Do not demand customers to provide information in formats you prefer, or demand information not required by DDW's rules.
>
> Do not threaten delayed processing if customers do not produce work in the format you prefer.[10]

---

[8] Exhibit A-39.

[9] Exhibit A-16.

[10] Exhibit A-16.

11. On October 26, 2016, Grievant filed a complaint with the federal Occupational Safety and Health Administration (OSHA), under provisions of the Federal Safe Drinking Water Act, alleging that the *Written Warning* was retaliatory.

12. On November 14, 2016, Grievant grieved the *Written Warning*.

13. On November 14, 2016, Grievant filed a records request under GRAMA[11] seeking all of Ms. Macauley's telephone records for the preceding six months.

14. On December 16, 2016, Ms. Macauley issued Grievant a *Notice of Intent to Discipline - Written Reprimand.*[12] The *Notice of Intent - Written Reprimand* specifically related to a November 9, 2016 incident between Grievant and a non-DDW employee, during which Grievant became extremely upset and acted unprofessionally.

15. On December 16, 2016, Ms. Macauley and Department of Human Resources Management (DHRM) representative, Michelle Watts, met with Grievant at his workplace in an attempt to deliver the *Notice of Intent - Written Reprimand*.

16. Grievant became upset at that meeting and stated that he could not continue the meeting due to health reasons.

17. Grievant left the meeting and returned a short time later, stated he could not continue the meeting, and left.

18. Ms. Macauley and Ms. Watts left the *Notice of Intent - Written Reprimand* on Grievant's desk.

19. On the following Monday, December 19, 2016, Grievant met with Ms. Watts to discuss the *Notice of Intent - Written Reprimand*. In that meeting, Grievant told Ms. Watts that he

[11] The Utah Government Records Access and Management Act, Utah Code Ann. §63G-2-101 *et seq*.

[12] Exhibit A-11.

was going to file a criminal complaint regarding the manner in which the *Notice of Intent - Written Reprimand* had been delivered to him on December 16, 2016.

20. On December 27, 2016, Grievant provided to Ms. Macauley a written response to the *Notice of Intent - Written Reprimand*, asserting that it did not specify the reasons underlying the intended discipline.[13]

21. On January 3, 2017, Grievant filed a GRAMA records request seeking all sanitary survey reports performed by Ms. Macauley.

22. On January 4, 2017, Ms. Macauley supplemented the December 16, 2016 *Notice of Intent - Written Reprimand*, providing additional information regarding the reasons for the proposed discipline.[14]

23. On January 4, 2017, Grievant filed an abusive conduct complaint against Ms. Macauley with DHRM. [15]

24. On January 13, 2017, Ms. Macauley issued Grievant a *Notice Imposing Discipline - Written Reprimand*.[16]

25. Grievant protested that the January 13, 2017 *Written Reprimand* did not include the mandatory notice of his appeal rights.

26. On January 18, 2017, Grievant delivered a copy of his abusive conduct complaint to Ms. Macauley.

---

[13] Exhibit A-12.

[14] Exhibit A-13.

[15] Abusive conduct complaints are filed, investigated, and decided under Utah Admin. Code R477-16-1 *et seq*.

[16] Exhibit G-364.

27. On January 18, 2017, Ms. Macauley filed an abusive conduct complaint against Grievant. Ms. Macauley subsequently filed three amendments to her complaint on February 15th, April 12th, and April 20, 2017 (collectively the "abusive conduct complaint").

28. On January 23, 2017, Ms. Macauley issued Grievant a revised *Notice Imposing Discipline - Written Reprimand*, which was identical to the January 13, 2017 *Written Reprimand*, except that it contained a statement of Grievant's appeal rights.

29. On January 24, 2017, Grievant amended his pending OSHA complaint to include allegations that the December 2016 *Notice of Intent - Written Reprimand*, the circumstances surrounding the attempted December 2016 delivery of that *Notice*, and the January 2017 *Written Reprimand* were retaliatory.

30. On January 25, 2017, Grievant filed a grievance challenging the January 13, 2017 *Written Reprimand*.

31. On March 29, 2017, DEQ Executive Director Alan Matheson denied Grievant's grievance of the *Written Warning* and his grievance of the *Written Reprimand*.

32. On April 12, 2017, DHRM determined that Grievant's abusive conduct complaint against Ms. Macauley was unsubstantiated.

33. On May 22, 2017, DHRM issued an *Investigation Report* of its investigation of Ms. Macauley's abusive conduct complaint against Grievant.[17] The *Investigation Report* resolved Ms. Macauley's complaint into seven specific allegations:

> i. That Grievant, after receiving the December 16, 2016 *Written Reprimand*, told Ms. Watts that he intended to file a criminal complaint regarding the circumstances of the document's December 16, 2016 delivery.

[17] Exhibit A-10.

ii. That following the October 2016 *Written Warning*, Grievant filed multiple records requests under GRAMA for all of Ms. Macauley's telephone records over a six-month period, and that he left copies of the GRAMA requests on Ms. Macauley's desk.

iii. That following his receipt of the January 2017 *Written Reprimand*, Grievant made a records request under GRAMA for all sanitary survey reports done by Ms. Macauley, and again left a copy of the request on Ms. Macauley's desk.

iv. That Grievant's comments to the July 2016 evaluation threatened Ms. Macauley.

v. That on April 7, 2016, Grievant complained to another manager about Ms. Macauley's conduct in an April 6, 2016 meeting. Ms. Macauley asserted Grievant's conduct was abusive because the victim of the conduct did not consent to the complaint.

vi. That on February 28, 2017, Grievant commented to staff that Ms. Macauley had inappropriately revealed confidential information.

vii. That Grievant "intentionally spreads lies to harm [Ms. Macauley's] professional reputation."

34. The *Investigation Report* concluded that the conduct alleged in Allegations (i) through (iv) did occur and constituted abusive conduct and concluded that the conduct alleged in Allegations (v) through (vii) did occur but did not rise to the level of abusive conduct.[18]

35. No later than May 22, 2017, OSHA dismissed Grievant's complaint of retaliation under the Safe Drinking Water Act as not stating a claim under the Act.

36. On June 12, 2017, Agency placed Grievant on administrative leave with pay, pending Agency's review of the *Investigation Report* and other issues relating to Grievant's employment.

37. On July 10, 2017, DDW Director Marie Owens issued Grievant an *Intent to Discipline - Dismissal for Just Cause and the Good of the Public Service*.[19] Div. Dir. Owens based

[18] At the times relevant to this case, there was no procedure by which an employee could obtain review of the findings of an abusive conduct investigation. In 2018, the Legislature established a process for administrative review of the findings of abusive conduct investigations by the Office: that review procedure was not available until May 8, 2018, well after the complaints relevant to this case. Laws, Chapter 390, 2018 General Session.

her decision to recommend the termination of Grievant's employment on the findings of the *Investigation Report*, Grievant's previous disciplinary actions, and Div. Dir. Owens's conclusion that Grievant's actions were disruptive to the workplace.

38. On August 1, 2017, Grievant met with Executive Director Alan Matheson (Exec. Dir. Matheson) to discuss the *Intent to Discipline - Dismissal*. Grievant presented his side of the matters discussed in the *Intent to Discipline* and presented documents in support of his position.

39. On September 26, 2017, Grievant received a *Final Agency Decision - Termination*. Agency issued this notice in error and immediately withdrew it.

40. Grievant and Agency continued discussions of possible resolution, short of termination of employment, but those discussions ended by October 20, 2017.

41. On October 23, 2017, Exec. Dir. Matheson issued Grievant a *Final Agency Decision - Termination*.[20] The Agency's *Final Decision* specified the results of the *Investigation Report* as the basis of the decision to terminate Grievant's employment and incorporated the July 10, 2017 *Notice of Intent*.

42. On October 30, 2017, Grievant initiated this proceeding by filing a grievance form with the Office, specifying as the subject of grievance: 1) dismissal; and 2) numerous violations of rules adopted under Chapter 19 of the Utah State Personnel Management Act.

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[19] Exhibit A-2.

[20] Exhibit A-1.

DISCUSSION

I. BURDEN OF PROOF AND STANDARD OF PROOF

Agency has the burden of proving that good cause for termination exists and it must carry that burden by substantial evidence.[21] Substantial evidence "is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion."[22] "It is more than a mere 'scintilla' of evidence and something less than the weight of the evidence."[23]

II. GRIEVANT'S TESTIMONY

At his originally scheduled testimony in his case in chief, Grievant brought a binder of notes and documents to the witness table to use in testifying. The Hearing Officer asked Grievant to not use the documents in the binder while testifying.[24] After explanation and discussion, Grievant allowed the Hearing Officer to inspect his notes *in camera*. The Hearing Officer determined that the notes were Grievant's notes and work product, intended to guide Grievant's testimony,[25] with the exception of copies of several documents. The Hearing Officer directed Grievant to remove those documents, or identify, or provide copies of those documents to Agency,

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[21] Utah Code Ann. §67-19a-406(2)(a), (b).

[22] *Larson Limestone Co. v. State of Utah*, 903 P.2d 429, 430 (Utah 1995) quoting *First National Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990); *see also Grace Drilling v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989).

[23] *Johnson v. Board of Review of Industrial Comm=n*, 842 P.2d 910, 911 (Utah App. 1992).

[24] *See* Utah Rule Evid. 612(b): "An adverse party is entitled to have the writing [used to refresh the witness's recollection] produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record."

The Hearing Officer recognizes that the Utah Rules of Evidence do not apply to CSRO proceedings but believes the approach set out in the Rule ensures fairness to both parties and minimizes the possibility that inadmissible or unreliable evidence may be introduced into the record.

[25] The Hearing Officer did not read the notes or attempt to determine Grievant's strategy, thoughts, or intended testimony.

before testifying. Grievant refused. The Hearing Officer explained to Grievant the consequences of his refusal; Grievant reiterated his refusal and did not testify.

The Hearing Officer allowed Grievant a second opportunity to testify later in the hearing. Grievant refused to allow *in camera* inspection of notes from which he intended to testify, claiming they were protected work product[26] and that review would disclose his hearing strategy to the Hearing Officer. The Hearing Officer again explained that if Grievant did not testify, the record would contain little evidence in support of his case. Grievant nevertheless refused to allow inspection and did not testify.

At the conclusion of the hearing, the Hearing Officer directed Grievant to submit a proffer of the testimony he would have provided had he testified. Grievant submitted that proffer.[27] The Hearing Officer has reviewed this proffer, and generally accepts the facts asserted therein, but not arguments or conclusions, as true. Those facts do not contradict other testimony or evidence in any material way.

III. GRIEVANT'S *PRO SE* STATUS AND HIS CONDUCT OF THE HEARING

Grievant acted as his own attorney prior to and during the Step 4 hearing. Although a *pro se* litigant should be held to the same standards as a licensed attorney,[28] in view of the less-formal nature of administrative hearings and the potential serious consequences of this proceeding to

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[26] The Hearing Officer does not decide if Grievant's notes are in fact protected work product. *See Gold Standard, Inc., v. American Barrick Resources Corporation*, 805 P.2d 164 (Utah 1990). Regardless, *in camera* review of the documents would have precluded Agency from any knowledge of the documents other than those documents intended to refresh Grievant's recollection: the documents themselves would not be Grievant's work product.

[27] Grievant's September 26, 2018 *Grievant's September 20, 2018, Post Hearing Ordered . . . Proffer.* Notwithstanding clear direction that the proffer was to include only statements of fact and was to include no argument, Grievant used a considerable portion of the proffer to advance argument in support of his case.

[28] *Mower v. Moyer*, 2017 UT App 1888, ¶17, 405 P3d 978, 983, *cert. den.* 412 P3d 1255 (Utah App. 2017) (despite his *pro se* status Grievant "will be held to the same standard of knowledge and practice as any qualified member of the bar").

Grievant, the Hearing Officer allowed Grievant considerable leeway, explaining procedures and rulings, and allowing Grievant substantial latitude in his statements and pleadings.

The Step 4 hearing in this case was originally scheduled for three (3) days: at the close of those 3 days, Agency had not yet completed presentation of its case in chief. The Hearing Officer concluded that Grievant's conduct and presentation of his case played a large part in this lack of progress, and in order to expedite the progress of the hearing, ordered Grievant to testify first in his case in chief and limited Grievant's time to testify and to examine other witnesses.[29]

Notwithstanding that order and repeated reminders to expedite his case, Grievant insisted on continuing conduct that delayed the progress of the hearing. Grievant repeatedly tried to introduce evidence that had been excluded by previous rulings on motions in limine or by previous rulings by the Hearing Officer; for example, Grievant continued to pursue examination challenging the facts underlying prior disciplinary actions against him, even though such evidence had been excluded[30] and repeated objections thereto had been sustained. Grievant regularly reargued prior rulings on evidence, continued to argue issues after a ruling, and asserted that he did not understand the Hearing Officer's rulings, despite multiple explanations.

Grievant insisted on "preserving" issues for appeal by reciting a lengthy statement of preservation that often included argument on the point preserved or on his case in general. Grievant made over one hundred of these statements during the last four days of the Step 4 hearing, ranging from thirty seconds to almost two minutes in length. He continued this practice after the Hearing Officer stated several times that such statements were not necessary to preserve an issue, that making argument with those statements was inappropriate, and that his continued

[29] July 27, 2018 *Order on Conduct of the Step 4 Hearing*.

[30] July 12, 2018 *Order on Motions in Limine*.

statements of preservation delayed the progress of the hearing and wasted his examination time. Nonetheless, Grievant insisted on continuing his conduct, stating, "[he] believe[s] his opinion is correct and the hearing officer's is not."[31] Grievant inefficiently used his examination time. Grievant asked multiple questions of many witnesses to establish what was essentially argument that he should have made in closing argument. Grievant consistently failed to establish a witness's knowledge, routinely leading to sustained objections on the basis of foundation or speculation. As noted, Grievant continued lines of questioning that had been ruled irrelevant or inappropriate.

Although some delay in the progress of the hearing may be reasonably be attributed to his *pro se* status, much of the delay was a direct result of Grievant's inefficient presentation of his case and his disregard of previous rulings, orders, explanations, and directions. Grievant was allowed more than sufficient time to present all evidence relevant to his case.

IV. GRIEVANT'S RECORD OF PRIOR DISCIPLINE

An employee's prior work record, including prior disciplinary actions, is relevant for the purpose of either mitigating or sustaining an agency's disciplinary decision.[32]

Agency disciplined Grievant on four occasions prior to the events leading to the decision to terminate:

> On July 12, 2006, Agency issued Grievant a *Memorandum of Written Warning* regarding his interpersonal skills with coworkers.
>
> On February 25, 2008, Agency issued Grievant a *Memorandum* warning him as to his inappropriate and unprofessional conduct in a February 15, 2008 incident in the Division of Drinking Water offices.
>
> On October 17, 2016, Agency issued Grievant a *Written Warning* based on complaints from Agency clients and Grievant's coworkers to the effect that they could not work efficiently with him generally directed to Grievant's communication style and demeanor.

[31] Tr.1772:24-25.
[32] R137-1-21(9).

> On January 23, 2017, Agency issued Grievant a *Written Reprimand* related to a November 9, 2016, incident between Grievant and a non-DDW employee.

Although they concerned similar conduct to that underlying the termination, the 2006 and 2008 disciplinary actions were followed by an eight-year period without discipline and with evaluations of Grievant's performance as "successful" or above. The 2006 and 2008 disciplinary actions are too remote in time to be relevant to the termination of Grievant's employment, and the Hearing Officer gives them no weight in deciding this case.

The October 2016 and December 2016 disciplinary actions are close in time to the events leading to the termination and were imposed for conduct similar to that which was cause for the employment termination. The *Written Warning* included six specific directions to Grievant for improvement of his conduct that Grievant ultimately failed to follow.

Grievant argues no written reprimand exists; because the original January 13, 2017 *Written Reprimand* did not contain a notice of his appeal rights, he considers it to be "null and void."[33] Agency replaced the January 13, 2017 *Written Reprimand* with a January 23, 2017 *Written Reprimand* that was identical except for the addition of a notice of Grievant's appeal rights. Grievant argues that there is no evidence that he ever received the January 23, 2017 *Written Reprimand*; however, Ms. Watts of DHRM testified that she received a confirmation that Grievant received the email transmitting the *Written Reprimand* and that she had no reason to believe that Grievant did not receive the January 23, 2017 *Written Reprimand*. Grievant's conscious refusal or unconscious neglect in not opening the attachment to that email, or otherwise not following up on a reprimand that he was aware of, does not negate the existence and effect of the *Written Reprimand*.

[33] Grievant's "Proffer . . . .," ¶ 34.

Both the October 2016 *Written Warning* and January 2017 *Written Reprimand* are relevant to the termination of Grievant's employment.

V. ADEQUACY OF NOTICE TO GRIEVANT OF THE REASONS FOR TERMINATION

Grievant argues that Agency did not "notify [Grievant] in writing of the specific reasons for the proposed dismissal or demotion" as required by DHRM rule.[34]

Grievant did not receive a copy of the *Investigation Report* until after his employment was terminated. He argues that July 12, 2017 *Investigation Findings*[35] letter he received is inadequate notice, and emphasizes that its language is nonsensical on its face, and does not describe the alleged instances of abusive conduct. Grievant stresses the inconsistent use of terms "verbal" and "non-verbal" in different documents to refer to the alleged abusive conduct as confusing.

Undoubtedly, the July 12, 2017 letter stating that Grievant directed abusive conduct to himself makes little sense and does not describe the alleged abusive behavior. At various times, various Agency and DHRM documents did describe Grievant's conduct as both "verbal" and "nonverbal." However, Grievant received other notifications of the reasons for Agency's decision to terminate Grievant's employment.

In the July 2017 *Notice of Intent to Discipline – Termination*, Div. Dir. Owens specifically referred to Grievant's prior discipline in 2006, 2008, October 2016, and December 2016, and to the findings of the *Investigation Report*. Although she did not describe the allegations in the *Investigation Report* in detail, Div. Dir. Owens did refer to the filing of GRAMA requests, threats to file a police report, and threats to his supervisor over a performance evaluation. Div. Dir. Owens also referred to the disruptive effect of Grievant's conduct on the workplace and the performance of DDW.

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[34] Utah Admin. Code R477-11-2(2)(a).

[35] Exhibit G-430.

Grievant was sufficiently on notice as to the allegations underlying Div. Dir. Owens's decision to recommend termination of employment; in fact, during his August 1, 2017 meeting with Exec. Dir. Matheson, Grievant was able to present his reasons and arguments why his employment should not be terminated.

In the subsequent *Notice of Termination*, Exec. Dir. Matheson specifically cited as cause for his decision to terminate Grievant's employment, the four substantiated allegations of the DHRM *Investigation Report*. He described each of those allegations in detail. He stated that the three unsubstantiated allegations did occur and, although they did not reach the level of abusive conduct, illustrated the "disruptive nature" of Grievant's conduct. He referred to Grievant's previous discipline in 2006, 2008, October 2016, and December 2016, to a "meritless" OSHA complaint that Grievant had pursued against DDW and his former supervisor alleging retaliation, and to another OSHA complaint against his former supervisor alleging retaliation which was found to be meritless. He incorporated into the *Notice*, Div. Dir. Owens's *Notice of Intent to Discipline*, which also discussed the disruptive effect of Grievant's conduct on the workplace and DDW's relations with its customers.

There is no evidence that Grievant asked for clarification or amplification of any of these documents prior to this proceeding.

A reasonable person reading the *Notice of Intent* and the *Notice of Termination* would understand the reasons, including the specific instances of abusive conduct, for Agency's decision to terminate Grievant's employment.

Even assuming *arguendo* that Agency's pre-termination notice to Grievant was insufficient, Agency provided copies of the *Investigation Report and Findings* to Grievant as early as October 2017, and provided other relevant documents to Grievant during this proceeding.

Grievant has had a full opportunity to respond to those documents and to their contents and to cross-examine both the Report's author and the witnesses identified in the Report during the Step 4 hearing. Complete post-termination due process is sufficient to protect Grievant's due process rights to notice.[36] Grievant knew, or should have known, the nature of Agency's reasons for terminating his employment in sufficient detail and time to fully meet them, and had complete post-termination notice and due process here.

Grievant received adequate notice of Agency's charges against him.

VI. CAUSE TO TERMINATE GRIEVANT'S EMPLOYMENT

Agency based the decision to terminate Grievant's employment in large part on the findings of abusive conduct in the *Investigation Report*. Agency also relied on the repetitive nature of Grievant's conduct including prior discipline, the likelihood that Grievant's conduct would not improve the effect of Grievant's conduct on Division morale, the effect of Grievant's conduct on Division productivity, and Grievant's violation of DEQ and DDW policies.

Abusive Conduct

DHRM rule states that

> (1) Abusive conduct includes physical, verbal or nonverbal conduct, such as derogatory remarks, insults, or epithets made by an employee that a reasonable person would determine:
>
> (a) was intended to cause intimidation, humiliation, or unwarranted distress;
>
> (b) exploits a known physical or psychological disability; or
>
> (c) results in substantial physical or psychological harm caused by intimidation, humiliation or unwarranted distress.
>
> (2) The following actions do not constitute abusive conduct unless they are especially severe and egregious:
>
> (a) a single act;
>
> (b) appropriate disciplinary or administrative actions;
>
> (c) appropriate coaching or work-related feedback;
>
> (d) reasonable work assignments or job reassignments; or

[36] *Cleveland Board of Education v. Loudermill*, 470U.S.532, 547-48, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Lucas v. Murray City Civil Service Com'n*, 949 P.2d 746, 754 (Utah App. 1997).

(e) reasonable differences in styles of management, communication, expression, or opinion.

(3) An employee may be subject to discipline under this rule even if the conduct occurs outside of scheduled work time or work location.[37]

The Investigative Report concluded that Allegations (i) through (iv) of Ms. Macauley's abusive conduct complaint constituted abusive conduct under this standard and that Allegations (v) through (vii) did not constitute abusive conduct under this standard.

There is substantial evidence supporting the conclusion that the conduct alleged in each of the seven individual allegations did occur.

Allegation (i)

Grievant, immediately after receiving the December 16, 2016 *Written Reprimand*, told Ms. Watts that he intended to file a criminal complaint regarding the circumstances of the document's December 16th delivery. Although he did not specifically name Ms. Watts or Ms. Macauley, there is no doubt as to the intended target of this criminal complaint. Even assuming *arguendo* that a criminal complaint was appropriate, there was no need for Grievant to tell Ms. Watts of his intention. Both Ms. Watts and Ms. Macauley testified that Grievant's statement upset them and caused them "intimidation, humiliation or unwarranted distress." A reasonable person would react similarly. A reasonable person would also conclude that Grievant's statement was intended to cause them, and would cause them, "intimidation, humiliation, or unwarranted distress."

The conduct of Grievant here clearly constituted abusive conduct.

Allegation (ii)

After Ms. Macauley issued the October 2016 *Written Warning*, Grievant filed a GRAMA records request seeking all of Ms. Macauley's telephone records over a six-month period.

[37] Utah Admin. Code R477-16-1.

Grievant asserted to Mr. Embley, who investigated Ms. Macauley's abusive conduct complaint, that Grievant needed those records to prepare a defense to the *Written Warning* and that he requested all of Ms. Macauley's calls because he did not know the phone numbers of the individuals to which the *Written Warning* referred. Mr. Embley discounted this, reasoning that Grievant already knew the phone numbers of relevant parties, thus making a request for all calls unnecessary. Although the *Written Warning* was issued on October 17, 2016, Grievant did not file the GRAMA request until November 14, 2016, the same day he filed his grievance; this timing further discounts his explanation.

Grievant argues that he has a right, as a citizen, to request public records under statute. Such rights are not unlimited. Abusive conduct is defined not by its illegality, but by its intent or its effect on others; conduct may be technically legal, but still constitute abusive conduct.

Mr. Embley considered it significant that Grievant took the "unusual step" of placing a copy of the GRAMA request on Ms. Macauley's desk. Based on Agency counsel's statement in final argument that Ms. Macauley could not remember whether or not a copy of the request was left on her desk,[38] Grievant argues that Mr. Embley's conclusion is unsupported. Mr. Embley concluded, based on his contemporaneous interviews of Ms. Macauley and others, that it did occur. Grievant did not successfully impeach Mr. Embley's credentials or experience as an investigator and did not elicit evidence from Mr. Embley or others that would tend to lessen the credibility of his conclusion in this instance.

In his October 7, 2018 *Motion for Order of Hearing Mistrial*,[39] Grievant argued that Ms. Macauley's testimony, as summarized by Agency counsel, that she was not sure that Grievant

[38] *Agency's Closing Argument*, September 27, 2018, pg. 7.

[39] That Motion was denied. October 31, 2018 *Order on Motion for Mistrial*.

actually left a copy of a GRAMA request on her desk, was a last-minute change in Agency's allegations and conclusively proved that he did not leave anything on Ms. Macauley's desk. At most, the challenged testimony goes to the credibility of Ms. Macauley and, perhaps, the credibility of the *Investigation Report*.

Mr. Embley is an experienced investigator of workplace issues,[40] and the Hearing Officer gives particular weight to Mr. Embley's conclusions on this point, which were based on his interviews of witnesses including Ms. Macauley shortly after the events in question.

Grievant did not provide testimony, introduce any evidence, or proffer testimony tending to show that he did not leave the GRAMA requests on Ms. Macauley's desk.

Grievant did not address this issue in his lengthy examination of Ms. Macauley. The Hearing Officer infers from that omission that Grievant expected Ms. Macauley's testimony would corroborate Mr. Embley's conclusions. The Hearing Officer also notes that Grievant did not address the issue in his September 26, 2018 *Proffer*.

Ms. Macauley knew, no later than at least February 15, 2017, that Grievant had filed the GRAMA records requests. [41] Since normal procedures would not have required that Ms. Macauley be notified of the request at all, the Hearing Officer infers that Grievant notified Ms. Macauley, in one way or another, that the requests had been filed.

The Hearing Officer also gives weight to the evidence that Grievant had a history of filing, or threatening to file, actions against individuals with whom he disagreed or against their professional licenses. Ms. Macauley believed that Grievant was looking for "ammunition" to use

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[40] Grievant argues that because this was Mr. Embley's first abusive complaint investigation, his conclusions should be discounted. Mr. Embley had performed "about one hundred" investigations of other workplace issues prior to his investigation of Ms. Macauley's abusive conduct complaint, and his fact-finding expertise is not in doubt.

[41] The date of her second amendment to her abusive conduct complaint against Grievant: her final two amendments concerned other matters. *See* Grievant's Proffer, ¶¶31, 35, 40, and 42.

against her. She stated that Grievant's conduct towards her between September and December 2016 was "hostile."

The Hearing Officer concludes that Grievant did inform Ms. Macauley that the GRAMA requests were filed, and it is more likely than not that he did so by leaving a copy of the requests on her desk.

Even though Grievant's request was technically legitimate, the scope of the documents requested, the unnecessary notification of Ms. Macauley, and the unlikely explanation offered by Grievant, lead to the conclusion that Grievant intended to cause Ms. Macauley "intimidation, humiliation, or unwarranted distress." It is clear that Grievant's conduct did cause Ms. Macauley "intimidation, humiliation, or unwarranted distress."

Substantial evidence supports the conclusion here that Grievant's conduct constituted abusive conduct.

Allegation (iii)

Following his receipt of the January 13, 2017 *Written Reprimand*, Grievant made a records request under GRAMA for all sanitary survey reports done by Ms. Macauley. Grievant was not Ms. Macauley's supervisor and had no work-related reason to review her prior projects. He stated to Mr. Embley that he was seeking errors in Ms. Macauley's work similar to those which were the basis of the *Written Reprimand*.

The existence of such errors by Ms. Macauley would be irrelevant to the *Written Reprimand*; they would not excuse or balance out Grievant's conduct. Grievant had no other reason to obtain those documents.

As discussed above, it is more likely than not that Grievant left a copy of the request on Ms. Macauley's desk.

For the same reasons as discussed above, Grievant's conduct intended to cause Ms. Macauley, and did cause her, "intimidation, humiliation, or unwarranted distress."

Substantial evidence supports the conclusion that Grievant's conduct here constituted abusive conduct.

Allegation (iv)

Following an evaluation that he considered to be unfair, Grievant added the following comments in the employee comment section of the evaluation:

> My inference is that DDW management more favorably performance-evaluates engineering staff who rubber-stamp public works engineering designs.
>
> * **
>
> DDW management should first be investigated to determine whether or not there is conscious, deliberate under-supervision of new staff, and other junior staff, to leave them intentionally ill-prepared to review public works project designs, and intentionally ill-prepared to protect the public against water project design errors.
>
> Secondly, DDW management should be investigated to determine whether or not management's reasons for taking away certain review assignments from me is to "shop" the assignments to other less-senior staff until DDW management can find a less discerning engineer with consequent briefer review time and more likely favorable review finding.
>
> Thirdly, DDW management should be investigated to determine whether or not certain categories of review assignments for illegitimate reason are not given to me and other experienced engineers. It should be determined whether or not DDW management excludes experienced engineers from review of certain projects because DDW management fears our raising of design flaw issues that junior engineers, ill-trained by DDW management, will not discern.[42]

Grievant made similar comments in his meeting with Ms. Macauley discussing the evaluation. Although Grievant did not mention Ms. Macauley by name in his written comments, it is clear that the comments were directed at her. As Grievant's supervisor, she was the person who would receive the comments. The comments address the same specific issue she had indicated

[42] Exhibit A-39.

needed improvement and had discussed with Grievant. Ms. Macauley believed she was the target of Grievant's comments because she was the only person with the specific responsibilities discussed. She was offended by Grievant's remarks.

There is no question that Grievant's comments were highly inappropriate. Although Grievant argues he was only fulfilling his responsibility as a professional engineer to call attention to deficiencies, his comments clearly responded and reacted to Ms. Macauley's comments. They go far beyond any response to those comments that would be appropriate; Grievant alleged not inadvertent error or honest mistake, but intentional wrongdoing. There is no evidence that Grievant had tried to bring such issues to management's attention before, or after, the evaluation, even though a procedure by which an employee might report unlawful or unprofessional conduct existed. The lack of other similar statements to management outside of disciplinary proceedings is convincing evidence that Grievant had no legitimate reason to include the comments in the evaluation.

Whether Grievant's comments were "threatening" is a matter of semantics. Both objectively and subjectively there is no doubt that Grievant's comments would, and did, cause Ms. Macauley "intimidation, humiliation, or unwarranted distress."

Substantial evidence supports the conclusion that the conduct of Grievant here clearly constituted abusive conduct.

Allegations (v-vii)

The *Investigation Report* concluded that the conduct as described in Allegations (v) through (vii) did occur, but did not rise to the level of abusive conduct. The conduct described was cited by Agency as corroboration of Grievant's pattern of conduct, even though it was not substantiated as abusive conduct. The Hearing Officer concludes that the conduct described in

Allegations (v) through (vii) occurred, but there is insufficient evidence to determine whether it was abusive under DHRM rule. The Hearing Officer considers the conduct described in allegations (v) through (vii) as no more than corroboration of other evidence of Grievant's conduct.

Agency Policies

Agency asserts that Grievant's conduct violated the DEQ Policies and Procedures[43] and DDW Operating Principles.[44] Paragraph 1 of the Policies and Procedures require DEQ employees to "demonstrate support of the mission, vision and values of the Department of Environmental Quality. They shall abide by the department's operating principles, administrative laws, rules, workplace policies and procedures that govern their work or professional activities." Paragraph 6 requires DEQ employees to "not be insubordinate, disloyal or disrespectful to the orders of a supervisor or manager, unless such order is reasonably believed to be in violation of this policy, or other established policy, rule or statute." Paragraph 7 requires employees to communicate appropriately through body language, sound and tone of voice, and e-mail exchanges.

The DDW Operating Principles required employees to treat individuals with respect and professionalism in any conflict, to listen and try to understand the other person's point of view, and to creatively explore mutually agreeable solutions, to treat staff in a professional manner.[45]

Exec. Dir. Matheson concluded that Grievant violated the Policies and Procedures and the Operating Principles.

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[43] Exhibit A-5.

[44] Exhibit A-6.

[45] Grievant objected that Exhibit A-7 is not a copy of the current *Operating Principles* but did not introduce a different document. Grievant subsequently established that Agency's Mission Statement had changed, but did not establish that the other provisions were substantively different.

The conduct described in Allegations (i) through (iv) of the *Investigation Report* as well as Grievant's conduct affecting Agency customers, productivity, and morale violates these provisions of both the DEQ Policies and Procedures and the DDW Operating Principles.

Grievant's effect on DDW customers, productivity, and morale

Exec. Dir. Matheson testified that two Agency customers complained about working with Grievant, which he considered a negative impact on Agency's ability to perform its function. Div. Dir. Owens believed that the negative effect of Grievant's conduct on DDW productivity was substantial.

After Grievant was placed on administrative leave, Agency quickly cleared some of Grievant's projects that had languished for substantial periods of time. The evidence did not show why Grievant had not closed those projects, or what work to complete those projects was done after he left Agency.[46] Agency's evidence as to employee workload and productivity did not distinguish various projects by complexity or other factors that would support a conclusion that Grievant consistently spent too much time reviewing projects. Although Grievant did generally take more time to review projects, it is impossible to determine from the evidence the magnitude of that fact's effect on agency productivity, or whether that time spent was due to complexity of his assigned projects or other legitimate reasons.

Other DDW engineers were "on guard" against Grievant and regularly took extra time to over-document their work, which resulted in a loss of productivity. Although the evidence establishes that this did occur, the evidence does not establish the magnitude of the effect on Agency's overall productivity.

[46] Grievant argues that he took the time necessary to perform an adequate engineering review of each project. The evidence does not establish this was or was not the case.

Grievant entered coworkers' project files, despite not having review authority over those projects or any other legitimate need to do so. Coworkers were concerned that they would be the next target of Grievant's allegations of unprofessional conduct or violation of the professional engineers' code of ethics. Grievant's demeanor and conduct made it difficult for co-workers and customers to work collaboratively with him. The consensus of the witnesses was that Agency morale was poor, that the poor morale was due to Grievant's conduct, and that Agency productivity and morale improved after Grievant left Agency.

Ms. Macauley testified that Grievant's usual reaction to any criticism or disagreement was to threaten the other person's professional license.

Grievant's conduct throughout this proceeding also tends to corroborate the testimony of Agency's witnesses and supports Agency's assessment of Grievant's conduct and its effect on Agency.

On at least three occasions, Grievant objectively intimidated or unsettled a witness by referring to the Fifth Amendment, or to the fact that they were testifying under oath when there was no legitimate reason to use such a question to verify their truthfulness or credibility. In fact, Grievant's first question to witness Dana Powers was "do you understand that you have a right not to incriminate yourself under the Fifth Amendment?"[47]. Moreover, Grievant did this after being specifically directed that such questioning was inappropriate.[48]

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[47] Tr. 1136:6-8.

[48] Prior to the Step 4 hearing, Grievant sought an order requiring that before the testimony of each witness who is a licensed engineer or geologist, the Hearing Officer instruct the witness that "he or she has a right against self-incrimination in testimony in hearing before the [CSRO] and therein he or she may legally refuse to answer Agency or Grievant questions to the witness in hearing before the Office on those grounds." Grievant further sought an order allowing Grievant to ask each such witness "if he or she understands his or her rights against self-incrimination" and "if he or she fully understands that he or she has a right to refrain from answering any hearing question . . . that he or she believes could possibly cause his or her self-incrimination." Grievant argued that those witnesses may choose to testify in a manner that incriminates them as to violations of the *Engineering Code of Conduct*. The Hearing Officer denied the Motion as likely to inhibit or taint the testimony of those witnesses, and further directed Grievant if such an

In its May 22, 2018 *Motion to Compel*, Agency's counsel wrote that Grievant requested a stay of discovery "in part to avoid responding to the discovery requests." Agency's statement was a reasonable interpretation of the circumstances and unremarkable in argument to a motion to compel. However, instead of simply denying Agency's statement Grievant wrote:

> Grievant respectfully cautions Agency's Counsel that if he persists in scurrilous attacks on Grievant, Agency's Counsel will do so at peril of [sic] Utah Bar complaint by Grievant alleging unethical conduct by Agency's Counsel. Agency's Counsel has a history of his being known in Utah legal circles in general, and known to Grievant in particular, for being untethered to the truth [emphasis in original],[49] and Grievant will not abide unchallengingly by such conduct in Grievant's matters again.
>
> Grievant demands that Agency's Counsel retract his scurrilous allegation that Grievant requested a stay in discovery in this matter "in part to avoid responding to the discovery requests."[50]

Throughout the remainder of his Response, Grievant referred to Agency counsel's "willful deceit," "misrepresentation," "untruthfulness," and "vacuous, inane argument."

Grievant continued to allege professional misconduct and untruthfulness by Agency's counsel throughout this proceeding, including most recently in almost every point of his October 12, 2018 *Objection to Agency's October 8, 2018, 'Agency's Rebuttal Closing Statement.'*

Grievant's lack of courtesy and respect extended to the tribunal as well. At various times in this proceeding, Grievant stated that the Hearing Officer "shamelessly discounted written testimony" and "outrageously, dismissively stated . . . ;" [51] that this proceeding was "rife with

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instruction became necessary during the hearing, that he must ask for the witness to be excused before raising it. *See* July 23, 2018 *Pretrial Order*.

[49] Grievant did not provide, and has not yet provided, any evidence whatsoever in support of this remarkable accusation. The Hearing Officer was unacquainted with agency counsel Mr. Widdison prior to this case, but notes that throughout this proceeding, Mr. Widdison has acted as an honest, ethical, and capable member of the bar.

[50] Grievant's May 25, 2018 *Response to Agency's Motion to Compel Discovery*, pg. 2.

[51] Grievant's July 13, 2018 *Motion to Reconsider*, pg. 2.

judicial error," that the Hearing Officer's conduct was "illegitimate," and that the Hearing Officer's "specious argument" was "patently false and illegitimate;"[52] that "a reasonable person would infer poorly-veiled Hearing Officer bias," that "the Hearing Officer's gamesmanship [is intended] to disadvantage Grievant, which includes the Hearing Officer's flippant overruling of Grievant's objections with patronizing admonishment of Grievant," and that "Grievant is appalled that the Hearing Officer has abused his authority in concocting fake legal arguments with no foundation in recognized precedent."[53]

During the hearing, Grievant made multiple references to the certainty and outcome of his appeal if he did not prevail, including referring to "future reviews of this record;"[54] stating that "this immediate motion for mistrial will be reviewed by future decision-makers . . . for the hearing officer's conduct in response to this motion;"[55] stating that he had conferred with "people that I believe are extremely renowned in Utah and educated in the law, and I believe that my arguments are on very, very sound ground . . . .;"[56] stating that he had "personal conversations with multiple renowned attorneys, members of the Utah State Bar" in whose opinion the Hearing Officer had ruled incorrectly;[57] and insisting on making over one hundred time-wasting, unnecessary "statements of preservation of issue for appeal." A reasonable person would conclude, based on the frequency, vehemence, and gratuitous nature of these comments that they were intended to intimidate the Hearing Officer.

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[52] Grievant's August 5, 2018 *Motion for Order of Hearing Mistrial*, pg. 6, 11, 12.

[53] Grievant's August 27, 2018 *Motion for Reconsideration of July 27, 2018, 'Order on Conduct of the Step 4 Administrative Hearing' . . . .*, pg. 3, 4, 6, 11.

[54] Tr. 1178:13-17.

[55] Tr. 1319:10-13.

[56] Tr. 1204:2-5. *See also* Tr. 1227:18:23.

[57] Tr. 1228:2-4.

Grievant regularly described any argument, opinion, or interpretation of fact or law or testimony contrary to his own as "false" or "dishonest."[58]

Grievant's conduct throughout this proceeding demonstrates that his preferred method to address a difference of opinion is to threaten, intimidate, belittle, and otherwise attack the other party. He consistently demonstrated a lack of courtesy and respect, and other conduct, that would make collaborative interaction with others impossible. Such conduct, which is objectively intimidating to others, would also tend to adversely affect the morale of coworkers and others. In exhibiting the same conduct towards the tribunal, he demonstrated a reasonable likelihood that this conduct would also extend to supervisors and superiors. If Grievant habitually indulged in such conduct in a formal proceeding intended to determine whether or not he returns to work for Agency, it is likely that he did no less in his everyday work environment. Grievant's conduct in the hearing thus tends to corroborate the testimony of Agency witnesses as to the disruptive, morale-breaking, and intimidating nature of Grievant's conduct.

Substantial evidence supports the conclusion that Grievant's conduct adversely affected Agency customers, productivity, and morale.

VIII. DECISION TO TERMINATE GRIEVANT'S EMPLOYMENT

Marie Owens, DDW director, testified that the findings of the *Investigation Report* were critical in her decision to recommend the termination of Grievant's employment. She also considered Grievant's effect on Department productivity, which she believed was substantial: she confirmed Grievant's conduct in conversations with staff. She also considered Grievant's prior discipline, including the 2006 and 2008 written warnings. Div. Dir. Owens testified that she decided to go directly to termination of employment, instead of demotion or suspension, because

[58] *See,* e. g., Grievant's October 4, 2018 *Closing Argument*, October 8, 2018 *Objections to Agency Closing Argument*, and October 12, 2018 *Objections to October 8, 2018 'Agency Rebuttal Closing Statement.'*

in her opinion the conduct described in the Investigation Report was sufficiently egregious, in light of Grievant's prior record, to justify termination. She believed that demotion or suspension would not protect staff from continuing abusive conduct: reassignment had already been tried without success.

Exec. Dir. Matheson, DEQ executive director, did not act on Div. Dir. Owens's recommendation for some time. Grievant and others met with Exec. Dir. Matheson on August 1, 2017, at which time Grievant presented his side of the case with relevant documents. The parties continued discussions to resolve the situation without a termination for some time. Exec. Dir. Matheson ultimately decided to accept the recommendation for termination of employment based on the severity of Grievant's conduct and the fact that previous attempts to work with Grievant resulted not only in no improvement, but in escalation of the abusive conduct. He concluded that the previous warnings had had no effect on Grievant's conduct. He considered Grievant's negative effect on Agency morale to be an aggravating factor. He considered a pattern of complaints about Grievant's "people skills" over a period of years, and the recurrence of the conduct, as significant factors. Exec. Dir. Matheson saw no "affirmative indication of willingness to recognize the impact of [Grievant's] conduct on the Agency and [his] coworkers and to suggest that there was a way that that behavior would change in the future."[59]

Several staff members had come to Exec. Dir. Matheson and told him something must be done about Grievant's conduct. Exec. Dir. Matheson heard complaints from customers and understood that morale was low. He spoke to those involved in the reprimand and the warning.

Grievant argues that his actions were not abusive and that he took no action that was not available to any member of the public, such as filing GRAMA requests, or available to any State employee, such as commenting on his evaluation or filing an abusive conduct complaint. He

[59] Tr. 1061:20-25.

argues that his disagreements with staff and management were no more than differences of professional opinion or were statements required by the professional engineer's code of ethics. He elicited testimony that there was no knowledge of any other employee being alleged with abusive conduct for similar actions.

Grievant's actions, while technically innocent, were taken in a context that renders them anything but innocent. Agency's allegations go not to what Grievant did, but the manner in which he did it.

Grievant argues that his professionalism must be defined by the engineer's code of conduct. He apparently does not recognize, or chooses to not follow, a general concept of professionalism. Exec. Dir. Matheson described this expectation as a standard of conduct requiring basing relationships with coworkers, courtesy, empathy, respect, and collaboration and good communication skills.

Agency also cited Grievant's filing of complaints of retaliation with OSHA and the fact that those complaints were deemed meritless. As Grievant argues, such filing in and of itself is not improper. There is no evidence as to whether those filings were well-taken or frivolous, or of their effect on Agency and its staff. The Hearing Officer therefore gives the fact of those filings no weight in reaching a decision.

The Office must ordinarily defer to the agency's judgment as to the level of discipline imposed.[60] In giving deference to the Agency's decision, the hearing officer is restricted to the standards he or she must apply and therefore cannot substitute his or her own judgment as to the propriety of discipline. "[T]he [Office] must give 'latitude and deference' to the Department's personnel actions. The [Office's] role in examining the Department's personnel actions is a limited

[60] Utah Admin. Code R137-1-21(3)(b).

one. The [Office] is restricted to determining whether there is factual support for the Department's charges against [a grievant] and, if so, whether the Department's sanction of dismissal is so disproportionate to those charges that it amounts to an abuse of discretion."[61] If there is substantial evidence to support an agency's decision as to discipline, the Office cannot set that decision aside unless termination is so unreasonable or disproportionate so as to constitute an abuse of discretion.

Agency's decision to terminate Grievant is supported by substantial evidence. As discussed below, it is not so unreasonable, inconsistent, or disproportionate to Grievant's conduct to be abuse of discretion.

IX. PROPORTIONALITY AND CONSISTENCY

Even if substantial evidence supports Agency's findings, the discipline imposed must be proportionate and consistent.

> When the CSRO hearing officer determines in accordance with the procedures set forth above that the evidentiary/step 4 factual findings support the allegations of the agency or the appointing authority, then the CSRO hearing officer must determine whether the agency's decision, including any disciplinary sanctions imposed, is excessive, disproportionate or otherwise constitutes an abuse of discretion. In making this latter determination, the CSRO hearing officer shall give deference to the decision of the agency or the appointing authority. If the CSRO hearing officer determines that the agency's penalty is excessive, disproportionate or constitutes an abuse of discretion, the CSRO hearing officer shall determine the appropriate remedy.[62]

Discipline is proportionate if it is appropriate to the severity of the underlying conduct: i.e., serious discipline should be reserved for serious misconduct. Discipline is consistent if similarly-situated individuals are treated in a similar manner: i.e., similar conduct should result in similar discipline. Discipline is an abuse of discretion if it "is clearly against the logic and the effect of such facts as are presented in support of the application, or against the reasonable and probable

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[61] *Career Service Review Board v. Utah Dept. of Corrections*, 942 P.2d 933, 942 (Utah 1997).
[62] Utah Admin. Code R137-1-21(3)(b).

deductions to be drawn from the facts disclosed upon the hearing."[63] Grievant "must, at a minimum, carry the burden of showing some meaningful disparity of treatment between [himself] and other similarly situated employees."[64] Grievant must compare his case to other disciplinary actions taken during the tenure of Exec. Dir. Matheson.

Agency imposed disciplinary actions on twelve employees during that time:

Employee 1:	Dismissal for abandonment of position
Employee 2:	Three-day suspension for inappropriate conduct during outside training
	Retirement in lieu of dismissal for inappropriate "rude" conduct with management during a conference call with an outside organization
Employee 3:	Written warning for misuse of State vehicles.
	Resignation after notice of intent to terminate for falsification of expense reports
Employee 4:	Administrative leave with pay; resignation in lieu of termination for unlawful harassment and inappropriate touching of coworker
Employee 5:	Termination for extended absence; not contested, employee now on long term disability
Employee 6:	Termination for extended absence currently pending; not expected to be contested; employee now on long-term disability
Employee 7:	Written warning for inappropriate email sent to reporter and "scathing" email sent to coworker.
	Written reprimand for becoming angry w/coworkers, using inappropriate language, and throwing mug against file cabinet.
Employee 8:	Written warning for inappropriate "combative and defensive" conduct with coworker

[63] *Tolman v. Salt Lake County Attorney*, 818 P.2d23, 26 (Utah Ct. App. 1991) (quotations and citations omitted).

[64] *Kelly v. Salt Lake City Civil Service Commission*, 2000 UT App 235 ¶ 30, 8 P.3d 1048 (Utah App. 2000).

Employee 9:	Written warning for lack of professionalism when interacting with coworkers
Employee 10:	Written warning for unprofessional conduct, acting in unprofessional manner; tone and body language were threatening and aggressive
Employee 11:	Informal counseling for using explicit language in personal phone call overheard by coworkers
	Written warning for using explicit language in personal phone calls overheard by coworkers, discussing topics regarding personal life that made coworkers uncomfortable
Employee 12:	Informal counseling for unprofessional conduct over disappointment at not being promoted
	Written warning after for talking to DDDW permittee about unhappiness as a DDW employee and ongoing job search[65]

The cases of Employees 2, 7, 8, 9, 10, and 12 are most comparable to Grievant: each involves unprofessional or inappropriate conduct towards coworkers or outside persons.[66]

In comparison to Grievant:

> Employee 2 was given a three-day suspension for inappropriate conduct during an outside training and was then terminated in February 2016 for inappropriate "rude" conduct during a conference call with an outside organization.
>
> Employee 7 was given a written warning for sending an inappropriate email to a reporter and sending a "scathing" email to a coworker and then was given a written reprimand in September 2015 for an incident in which he became angry with coworkers, used inappropriate language, and threw a mug against a file cabinet.
>
> Employee 8 was given a written warning in February 2016 for inappropriate "combative and defensive" conduct with a coworker.
>
> Employee 9 was given a written warning for lack of professionalism when interacting with coworkers

[65] Exs. A-40, A-42, A-43.

[66] Although Employee 4 was also dismissed for conduct similar to abusive conduct, that employee's conduct included physical touching; as Grievant was not alleged to have touched any person, that discipline is dissimilar to Grievant's case.

> Employee 10 was given a written warning in November 2016 for unprofessional conduct, acting in unprofessional manner, and for tone and body language that were threatening and aggressive
>
> Employee 12 was given informal counseling in June 2017 for unprofessional conduct over disappointment at not being promoted, and received a written warning in October 2017 after talking to a DDW permittee about their unhappiness as a DDW employee and ongoing job search.

The only terminated employee, Employee 2, was suspended before termination. Agency did not suspend Grievant after the *Written Reprimand*, but proceeded directly from the *Written Reprimand* to termination of employment. Div. Dir. Owens concluded that that in view of the nature of Grievant's conduct and the previous discipline, a suspension would not have protected staff from the adverse effects of Grievant's conduct. She believed that Grievant knew the rules and standards he must to meet, and that he was aware of his objectionable conduct and the effects it had on coworkers and Agency, and that he would not change that conduct. She feared that a suspension would have exposed staff to further abusive conduct by Grievant when he returned to work. A previous reassignment of Grievant had not resolved these issues.

Agency reasonably exercised its discretion to bypass the step of suspension and proceed directly to termination of employment. Agency had valid reasons to do so and its decision to do so was rational, logical, reasonable, and was not an abuse of discretion.

Employee 7 received a written warning and then a written reprimand, but has received no further discipline since September 2015. Employees 8, 9, 10, and 12 each received a written warning; Employees 8 and 10 were last disciplined over two years ago, and Employee 12 was last disciplined over one year ago.

Agency disciplined Grievant twice in four months, in October 2016 and January 2017, before finally recommending termination in July 2017. Agency's progression of discipline of

Grievant, including termination, was consistent with its prior discipline of other employees exhibiting similar conduct.

Agency set out several reasons why it concluded that termination of Grievant was appropriate. Termination for conduct such as Grievant is not unreasonable given Grievant's repetition of the conduct and its effect on the operations of Agency and on its staff.

The fact that Agency terminated the employment of other employees for more heinous conduct that was arguably criminal (such as falsifying expense reports and unwanted sexual touching) does not render termination for Grievant's conduct *per se* disproportionate. Termination is the maximum disciplinary action Agency can impose, and it may properly impose termination for a variety of conduct that may or may not constitute criminal conduct.

Other Agency employees also were involved in confrontational and/or heated discussions with coworkers during Grievant's tenure with Agency. However, those incidents were isolated incidents and opinion was mixed as to whether the conduct was inappropriate. Such conduct was not a continued practice by any individual and did not rise to the level and frequency of Grievant's conduct.

"Meaningful disparate treatment can only be found when similar factual circumstances led to a different result without explanation."[67] Agency terminated one other employee for inappropriate conduct that arguably had less adverse effect on Agency's operation that Grievant. Agency followed a course of progressive discipline through which Grievant did not show any prospect of improving his conduct, and which had demonstrated an adverse effect on Agency's operations and on its employees. Agency presented substantial evidence to support its decision to bypass the step of suspension in Grievant's case.

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[67] *Kelly*, 2000 UT App 235, ¶31.

Agency's decision to terminate Grievant was neither disproportionate nor inconsistent. The evidence supported Agency's decision to terminate. Decisions to terminate employment that are rational, logical, and reasonable withstand challenges of abuse of discretion. Agency's decision was not an abuse of its discretion.

X. RETALIATION

Prior to this proceeding, in July 2017, Grievant filed a separate grievance of retaliation against Agency with the Office.[68] That grievance alleged that Agency's June 12, 2017 action placing him on administrative leave and Agency's July 10, 2017 issue of the *Notice of Intent to Discipline - Dismissal* were both retaliatory. In November 201y, the Office dismissed that grievance for lack of jurisdiction.

Prior to the beginning of the Step 4 hearing here, Agency moved to dismiss any claim of retaliatory discharge by Grievant. Despite his earlier July 2017 grievance alleging retaliation, on his October 30, 2018 Grievance Form (the form for this proceeding), Grievant did not check the box marked "retaliatory action prohibited by the Utah Protection of Public Employees Act."[69] Additionally, Grievant affirmatively stated that he did not pursue a claim of retaliation in this proceeding.[70] The Hearing Officer therefore granted the Motion and dismissed all claims of retaliation prior to the Step 4 hearing.

Notwithstanding that ruling and his earlier representation that he was not pursing a claim of retaliation, throughout the hearing, Grievant continued to refer to retaliatory discharge and attempted to introduce evidence relating to retaliatory action. Grievant argued that such evidence

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[68] *Onysko v. Utah Department of Environmental Quality*, Case No. 2010 CSRO/HO 143. On the Grievance Form, Grievant checked the box for "retaliatory action prohibited by the Utah Protection of Public Employees Act."

[69] *See* Exhibit 2 to Agency's July 9 *Motion*.

[70] Tr. 21:13-20.

went to the credibility of witnesses, particularly Div. Dir. Owens. Grievant, at different times, argued the initiating event leading to the alleged retaliatory discharge was his filing of an abusive conduct complaint against Ms. Macauley, his allegations of engineering supervisory deficiencies in DDW, his stating his views as to perceived violations of the professional engineer's code of ethics, his filing of a retaliation complaint with OSHA, or his stating of his professional opinions that particular water systems were unsafe or flawed.

Ms. Macauley testified that she began working on her complaint against Grievant well before he filed his complaint and that the timing was coincidental. The Hearing Officer concludes that Ms. Macauley's filing of a complaint against Grievant was not retaliatory and that the filing of the complaint does not affect her credibility as to other matters.

Div. Dir. Owens testified that she based her decision to recommend termination of employment on the events chronicled in the *Investigation Report*, her discussions with staff, and the other reasons set out in her notice of intent. Even assuming *arguendo* her motivation is suspect for retaliatory bias, substantial evidence, independent of Div. Dir. Owens's testimony, establishes Grievant's conduct and its effect on Agency, and supports the conclusions of the *Investigation Report* that supported her decision to terminate Grievant. The testimony of other witnesses, as well as Grievant's own conduct during the Step 4 hearing, corroborated her testimony as to the effect of Grievant's conduct on Agency and its staff.

Exec. Dir. Matheson testified that he based his decision to terminate Grievant's employment on those same factors and his conclusion that Grievant's conduct had not improved following the *Written Warning* and *Written Reprimand*.

Grievant argued that the statement of Shane Bekkemellom[71] was falsely dated November 9, 2016, to predate the November 10th notice to Agency of Grievant's OSHA complaint alleging retaliation. Mr. Bekkemellom authored the memorandum on or about November 17, 2016 and he emailed the memorandum to Ms. Powers of DHRM on November 18, 2016. There is no evidence that Mr. Bekkemellom or Ms. Powers knew of the pending OSHA complaint at that time. There is no evidence that DEQ management asked Mr. Bekkemellom to author the memorandum. Importantly, there is no evidence that Grievant raised the issue of retaliation in his grievance of the *Written Warning* arising from that incident.

The evidence does not support Grievant's argument of retaliation. There is substantial evidence, independent of any retaliatory animus, to support Agency's finding of good cause to terminate Grievant's employment.[72] The termination was not retaliatory and any retaliatory motive that may have existed did not affect Agency's decision to terminate or any testimony given at the Step 4 hearing.

XII. OTHER ISSUES

Grievant advanced numerous arguments during the course of this proceeding, both in pleadings and during the Step 4 hearing. To the extent those arguments are not specifically addressed herein, the Hearing Officer has reviewed those arguments and concluded that they carry no weight in reaching this decision.

CONCLUSIONS OF LAW

1. Grievant properly invoked the jurisdiction of the Office to hear this case.

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[71] Exhibit A-14.

[72] *See, Dinger v. Department of Workforce Services*, UT App 59, 300 P.3d 313 (Utah App. 2013) (Administrative determination of just cause for termination and finding of no retaliatory discharge supported by substantial evidence).

2. Agency must prove, by substantial evidence, that it has correctly applied relevant policies, rules, and statutes.

3. Agency must prove, by substantial evidence, that good cause exists for terminating Grievant or that the termination advanced the public good.

4. Substantial evidence supports each of the seven allegations addressed by the Investigation Report.

5. Substantial evidence supports the finding that Grievant's conduct constituted abusive conduct.

6. Substantial evidence supports the finding that Grievant's conduct adversely affected Agency customers, productivity, and morale.

7. Grievant's conduct as described in Allegations 1 through 4 as addressed by the Investigative Report and as found in this Decision was abusive under DHRM rule.

8. Agency's decision to terminate Grievant was proportionate to the cited causes for termination.

9. Agency's decision to terminate Grievant was consistent with Agency's discipline for similar conduct by other Agency employees.

10. Agency's decision to terminate Grievant was supported by substantial evidence.

11. Agency's decision to terminate Grievant was not an abuse of its discretion.

12. Agency correctly applied all relevant policies, rules, and statutes.

13. Agency had good cause to terminate Grievant.

14. Agency's decision to terminate Grievant advanced the public good.

CONCLUSION

Agency's decision to terminate Grievant is therefore AFFIRMED.

DATED this 5th day of November 2018.

GEOFFREY LEONARD
CSRO Hearing Officer

RECONSIDERATION

Any request for reconsideration must be filed in writing with the Career Service Review Office within twenty days after the issue date of this decision. (Utah Code Annotated §63G-4-302)

JUDICIAL REVIEW

A party may petition for judicial review of this formal adjudication and final agency action pursuant to Utah Admin. Code R137-1-21(13) (14), and Utah Code Ann. § 63G-4-401 and 403, Utah Administrative Procedures Act

CERTIFICATE OF SERVICE

I certify that on this 5th day of November 2018, I caused to be emailed, the foregoing *Findings of Fact, Conclusions of Law, Decision and Order* in the matter of *Steven J. Onysko v. Utah Department of Environmental Quality,* Case No. 2010 CSRO/HO 147 to the following:

Stephen J. Onysko
Grievant
Onysko5@burgoyne.com

Melissa Walker
Asst. Attorneys Paralegal
mmwalker@agutah.gov

Alain Balmanno
Daniel Widdison
Asst. Attorneys General
abalmanno@agutah.gov
dwiddison@agutah.gov

Annette Morgan
CSRO Legal Assistant